Supreme Court, U.S.
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No.

In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
PETITIONERS,

v.

TIMOTHY M. COHANE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The plaintiff, Timothy M. Cohane, was the men's head basketball coach at SUNY-Buffalo. He brought this action against the National Collegiate Athletic Association under 42 U.S.C. § 1983, seeking $15 million in damages, alleging that the NCAA's report describing the results of its own investigation into rule violations at SUNY-Buffalo deprived him of his liberty interest in his reputation and ability to pursue his chosen occupation. The district court dismissed Cohane's complaint for failure to plead any theory that would support a finding that SUNY-Buffalo's cooperation in the NCAA's investigation "somehow transforms the NCAA's well-established private conduct into state action for purposes of Section 1983." The Second Circuit reversed. The questions presented are:

1. Whether the Second Circuit erroneously held, in conflict with decisions of this Court and other courts of appeals, that the NCAA could be held liable under § 1983 based on allegations that "the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty."

2. Whether this Court should grant, vacate, and remand the Second Circuit's decision in light of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

LIST OF PARTIES

In the court of appeals, the plaintiff/appellant was Timothy M. Cohane, and the defendants/appellees were the National Collegiate Athletic Association ("NCAA" or "Association"), by and through its President, Myles Brand, Tom Hosty, as an NCAA Enforcement Director and as an employee of the NCAA, Stephanie Hannah, as an NCAA Enforcement Director and as an employee of the NCAA, and Jack Friedenthal, as an agent of the NCAA and former Chairman of the NCAA Committee on Infractions. The NCAA is a voluntary, unincorporated association consisting primarily of public and private colleges and universities.

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OPINIONS BELOW

The district court's opinion is available at 2005 WL 2373474 (Pet. App. 6a-20a). The Second Circuit's opinion is reported at 215 Fed. Appx. 13 (Pet. App. 1a-5a).

JURISDICTION

The Second Circuit denied the NCAA's petition for rehearing and rehearing *en banc* on March 29, 2007 (Pet. App. 21a-22a). On June 12, 2007, Justice Ginsburg granted the NCAA's application for an extension of time to file the petition for certiorari to and including July 27, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any ... person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...." The Fourteenth Amendment provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

The NCAA is a private and voluntary unincorporated association of public and private colleges and universities across the country. It "plays a critical role in the maintenance of a revered tradition of amateurism in college sports," *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984), by adopting and enforcing rules on matters such as academic standards for athletic eligibility, admissions, financial aid, and athletic recruiting. "By joining the NCAA, each member agrees to abide by and to enforce such rules." *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

The NCAA's bylaws create a Committee on Infractions, which "supervises an investigative staff, makes factual determinations concerning alleged rule violations," *id.*, and is expressly authorized to "[i]mpose an appropriate penalty ... on a member found to be involved in a major violation ...

or recommend to the Board of Directors suspension or termination of membership, [or . . .]" NCAA Bylaw 19.1.3(d). Member schools have also agreed that "[t]he enforcement policies and procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA enforcement staff, Committee on Infractions or Infractions Appeals Committee during the course of an inquiry." NCAA Bylaw 19.01.3.

In *Tarkanian*, a college basketball coach argued (and the Nevada courts held) that the NCAA was liable under § 1983 as a "joint participant" in state action with a public university, in part because the university had agreed to assist NCAA investigators. Tarkanian argued that "the State's involvement is not merely significant, substantial, and pervasive, it is *essential* to the enforcement of the NCAA's determination and directive," and that "the NCAA *must* utilize state officials [in the investigative process and that] makes the NCAA a joint participant in state action." Br. for the Resp't at 46-47, *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (No. 87-1061). This Court rejected that argument, holding that "the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university." 488 U.S. at 196.

This case presents yet another § 1983 action by a coach against the NCAA, seeking to establish that the NCAA's private investigative activities somehow become state action when assisted by a public university. The expansive theory of state action adopted by the Second Circuit is unsupported by this Court's long-established jurisprudence, is in conflict with other circuits, and warrants review.

Allegations of the Complaint

On August 9, 1999, a Mid American Conference employee sent a letter to the NCAA, confirming a prior phone conversation regarding alleged rule violations at SUNY-Buffalo. Pet. App. 28a. Following a meeting with

University officials on December 3, 1999, Cohane resigned as men's head basketball coach. *Id.* In the spring of 2000, after the basketball season and after some athletes had exhausted their eligibility, the NCAA enforcement staff requested interviews with several student athletes to discuss the allegations against Cohane and SUNY-Buffalo. *Id.* at 30a. Cohane alleges that "[s]tudent-athletes told State officials at SUNY Buffalo that they would not interview with the NCAA enforcement staff. In response, school officials under the control of the NCAA and aiding NCAA misled and improperly advised student-athletes that if they did not comply with the NCAA request for an interview [receipt of] their degrees could be at risk." *Id.*

Nearly a year later, on January 29, 2001, NCAA investigators Hosty and Hanna issued a case summary to be used by the Committee on Infractions. Cohane alleges, *inter alia*, that in preparing the case summary Hosty and Hanna relied upon information provided by SUNY-Buffalo that they knew was "coerced, false and otherwise tainted," and that "Hosty and Hanna willfully and recklessly changed testimony in order to implicate plaintiff in alleged rules violations." *Id.* The Committee received that report at its February 9, 2001 hearing. *Id.*

On March 21, 2001, the Committee issued a report of its investigation titled "University at Buffalo, The State University of New York Public Infractions Report," concluding that Cohane was guilty of "major violations," and that he was "'evasive, deceptive and not credible'" and had acted "'contrary to the principles of ethical conduct.'" *Id.* at 31a (quoting Report). The NCAA and SUNY-Buffalo held a press conference where school officials "'accept[ed] the report and its findings in its entirety.'" *Id.* (citation omitted). The NCAA Appeals Committee later found that "'many aspects of the case were troublesome,'" but it did not modify any of the NCAA's findings and conclusions. *Id.* at 32a (citation omitted).

Cohane then filed this suit under 42 U.S.C. § 1983 naming the NCAA, a private entity, and its employees and

agents, as the only defendants. (Cohane later filed a separate suit against the University.) His complaint alleges that the NCAA's investigative report deprived him of his liberty interest in his reputation without due process of law. *Id.* at 33a. He alleges that the NCAA is liable under § 1983 because it "jointly participated ... in a wrongful pattern of wrongful conduct and actions which violated plaintiff's rights." *Id.* He also brought state law claims against the NCAA for tortious inference with contract.

Proceedings Below

1. The NCAA filed a motion to dismiss arguing, *inter alia*, that Cohane's allegations did not distinguish this case from *Tarkanian* and that the "joint participation" theory of state action he relied upon is limited to the facts of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 n.21 (1982). Cohane argued that *Tarkanian* was different because there UNLV took the direct step that harmed the plaintiff, whereas here Cohane "assert[ed] that the NCAA itself conducted an unfair investigation, used tainted testimony and coerced student athletes to give false testimony," Pl.'s Mem. of Law in Opp. at 13, *Cohane v. NCAA*, No. 04-CV-181S, 2005 WL 2373474 (W.D.N.Y. Sept. 27, 2005), and "the NCAA's own investigation as conducted of him was corrupt, improper and designed to deprive him of his ability to coach a college team . . . .," *id.* at 7.

The district court rejected Cohane's reliance on *Lugar*'s "joint participation" test, finding that it is limited to prejudgment attachment cases. Pet. App. 17a n.2. It held that Cohane's complaint was not sufficient to allege state action by the NCAA. *Id.* at 17a-18a. The district court also dismissed Cohane's state law tortious interference claims on statute of limitations grounds.

2. The Second Circuit reversed, holding "that the District Court erred in concluding that Cohane could prove no set of facts showing that the NCAA was a 'willful participant in joint activity with the State.'" Pet. App. 3a (quoting *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 296

(2001) (quoting *Lugar*, 457 U.S. at 941)). The Court of Appeals explained that Cohane "argues that the NCAA's March 21, 2001 report of its investigation ... and the University's ratification of the Report's findings, defamed him ...." *Id.* It distinguished *Tarkanian* on the ground that the NCAA and UNLV acted like adversaries—but Cohane alleges that the NCAA and SUNY-Buffalo cooperated. *Id.* at 5a. The Second Circuit also reasoned that in *Tarkanian* "'[t]he NCAA enjoyed no governmental powers to facilitate its investigation,'" whereas "Cohane specifically alleges that the University used its authority to compel witnesses to testify against him just as if they had been compelled by subpoena." *Id.* (quoting *Tarkanian*, 488 U.S. at 197). The Second Circuit read Cohane's complaint to allege "that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty," and that "without the State's assistance and the exercise of its coercive authority upon the student witnesses, the NCAA could not have issued the defamatory report and imposed sanctions on Cohane." *Id.* It held that those allegations of willful cooperation *by the University* were sufficient to allege state action by *the NCAA*. *Id.* The court did not require, or find in the complaint, any allegation that the NCAA had willfully participated in any official misconduct by the University.

REASONS FOR GRANTING THE WRIT

This is a simple state law defamation case masquerading as a § 1983 claim. The Second Circuit's decision represents the first time since this Court decided *Tarkanian* 20 years ago that *any* court has held that the NCAA's investigative and enforcement activities could be state action subject to constitutional standards.[1] The court of appeals reached that

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[1] *See Salazar v. NCAA*, No. 8:06cv415, 2007 U.S. Dist. LEXIS 16736, at *6 (D. Neb. Mar. 5, 2007) ("[T]he ... Supreme Court has previously determined that the NCAA does not act under color of state law for purposes of § 1983."); *Harrick v. Bd. of Regents of Univ. of Georgia*, No. 04-0541, slip. op. at 4 (N.D. Ga. Apr. 15, 2004) ("[N]either the University of Georgia's cooperation with the NCAA investigation nor their compliance with NCAA regulations in that regard convert the NCAA's

remarkable result by combining the lax "no set of facts" pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), which this Court just overruled in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), with an unacceptably loose and malleable interpretation of the "joint participation" test for state action, which this Court has repeatedly attempted to confine to the facts of *Lugar* and *Burton*. The Second Circuit's decision squarely conflicts with precedents of this Court and several other circuits, and highlights the pervasive confusion surrounding the "joint participation" test. *See* Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1064 (1990) (noting that the "combination of action by state and private actors has repeatedly led to confused opinions"). This Court's intervention is urgently needed.

First, this case presents the Court with an appropriate and long overdue opportunity to clarify the "joint participation" test for state action. Justices of this Court have been criticizing *Burton* and attempting to limit *Lugar* to its facts for decades. In *American Manufacturers Mutual Insurance Co. v. Sullivan*, this Court chastised the court of appeals for "figuratively throw[ing] up its hands and fall[ing] back on [the] language in our decision in *Burton*," explaining that although *Lugar* "contains general language about 'joint participation' as a test for state action ... its language must not be torn from the context out of which it arose." 526 U.S. 40, 57, 58 (1999). Several courts of appeals have received that message. This case clearly would have been dismissed in the Fourth Circuit, which recognizes

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actions into state action. In *Tarkanian*, the Court rejected the notion that the university's cooperation with the NCAA ... was tantamount to a partnership agreement or transfer of certain university powers to the NCAA."); *Matthews v. NCAA*, 179 F. Supp. 2d 1209, 1218 (E.D. Wash. 2001) (same); *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997) (same); *Jones v. NCAA*, 679 So. 2d 381, 382 (La. 1996) (same); *Collier v. NCAA*, 783 F. Supp. 1576, 1578 (D.R.I. 1992) (same); *McRae v. Sweet*, No. 91-CV-1403, 1991 U.S. Dist. LEXIS 18260, at *10 (N.D.N.Y. Dec. 13, 1991) (same).

that this Court has "refine[d]" the state action analysis since *Burton* and *Lugar* and that there is no general "joint participation" test for state action. *See DeBauche v. Trani*, 191 F.3d 499, 506-07 (4th Cir. 1999), *cert. denied*, 529 U.S. 1033 (2000). But other courts of appeals (like the Second Circuit here) continue to rely on the "general language" of *Burton* and *Lugar* to impose § 1983 liability on private parties, for engaging in wholly private conduct, merely because a state actor was involved in the fact pattern.

This Court may also wish to consider summary reversal. *Burton* and *Lugar* have been expressly limited to their facts, and this Court has never found state action under the bare "joint participation" theory in any other case. The Second Circuit also clearly erred by holding that Cohane's allegations distinguish this case from this Court's decision in *Tarkanian*. A member university's decision to cooperate with rather than oppose an NCAA investigation does not change the basic character of what the NCAA itself does. And Cohane's argument that the NCAA investigation could not have proceeded without the evidence-gathering assistance of SUNY-Buffalo adds nothing new. Tarkanian made that same argument, and this Court rejected it.

Second, this case also presents a related important issue: Whether a finding of joint "state action" necessarily justifies holding the private actor liable in damages under § 1983. The Second Circuit allowed this § 1983 case to go forward against the NCAA, based on public acts committed by *SUNY-Buffalo* during an allegedly "joint" endeavor—and without requiring any allegation or proof that the NCAA conspired to procure those public acts or even knew about them. Joint action with private parties may establish "that the State is *responsible* for the specific [private] conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). But the State's willful participation in joint activity with a private party is not enough to establish that the private party acted "under color of law." If the private actor is not fairly responsible for the alleged misuse of official power, it should not be liable under § 1983.

Unfortunately, unnecessary language in this Court's decision in *Lugar* has made it difficult for the lower courts to draw such distinctions, by suggesting that "state action" and action "under color of law" are interchangeable. That makes sense in the ordinary state action case in which a plaintiff "seeks to hold state officials liable for the actions of private parties." *Blum*, 457 U.S. at 1003. But in cases like this one where the plaintiff is trying to hold the *private* party liable because of the state's involvement in otherwise private conduct, it produces absurd results. Justice Powell, joined by Justice O'Connor and then-Justice Rehnquist, explained in dissent in *Lugar* that conflating public and private responsibility in that manner is "plainly unjust" and "a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with [the] law." 457 U.S. at 944-45 (Powell, J., dissenting).

In this case, the Second Circuit held that state action might be found if "the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty." Pet. App. 5a. But *the university's* alleged decision to use its state powers to assist the NCAA's investigation does not establish that *the NCAA* itself did anything "under color of law" or that it should be held responsible for any alleged abuses of power by the university (which were, of course, beyond its control). The allegation that "without the State's assistance and the exercise of its coercive authority upon the student witnesses, the NCAA could not have issued the defamatory report and imposed sanctions on Cohane," *id.*, might justify a claim against SUNY-Buffalo (and Cohane is now pursuing one) for the consequences of the NCAA's report (assuming the students' rights were violated and that Cohane can litigate on their behalf), but it clearly does not justify a finding that *the NCAA* acted "under color of law" or even did anything wrongful.

If this Court does not strictly confine the "joint participation" theory to the facts of *Burton* and *Lugar*, it should at least revisit the dispute between Justice Powell

and the majority in *Lugar* and clarify that the presence of "state action" by state officials in a joint participation context does not necessarily mean that the private party acted "under color of law." That outcome can be so plainly unjust that several courts of appeals have ignored the problematic language in *Lugar* and recognized that a finding of joint state action does not necessarily make a private actor a proper § 1983 defendant. If this case had arisen in the Seventh Circuit, for example, that court would have held that Cohane's allegations could at most justify a suit against SUNY-Buffalo.

Third, at a minimum, this Court should grant, vacate, and remand this case in light of *Twombly*, which overruled *Conley* and explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1964-65. The Second Circuit reversed here based on the now-overruled "no set of facts" test from *Conley*. Pet. App. 3a, 5a. Cohane's complaint is just like Twombly's. It recites legal conclusions (such as that SUNY-Buffalo officials were somehow "under NCAA control") but does not genuinely allege any *facts* that support those conclusions.

This case has broad significance for all private actors that sometimes work in conjunction with government agencies. And it is tremendously important for the NCAA and college athletics. The NCAA conducts approximately 30 investigations per year, and its bylaws require member schools to cooperate fully in those investigations. Some member schools are private and some are public, but the NCAA's obligations to its members and to student athletes must not change with which school happens to be under investigation. As this Court is well aware, sports arouse intense passions and are a fertile source of litigation. If the NCAA risks § 1983 liability whenever an investigated public school is forthcoming and open with investigators, it will be forced to conduct its investigations and enforcement proceedings under a constant threat of litigation and costly,

time consuming, and extensive discovery, not to mention the potential for fee-shifting awards under § 1983. Such litigation could cripple the Association's ability to enforce the rules that its members have agreed upon.

I. THE "JOINT PARTICIPATION" TEST FOR STATE ACTION SHOULD BE CONFINED

A. The Second Circuit's Analysis Conflicts With Decades Of Efforts By This Court To Confine The Joint Participation Test

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power," and "avoids imposing on the State, ... responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. This Court has held that "the State is *responsible* for the specific conduct of which the plaintiff complains" primarily when it "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State," *Blum*, 457 U.S. at 1004, when a private actor wields traditional sovereign powers, *e.g. Marsh v. Alabama*, 326 U.S. 501 (1946), or when state officers are deeply "entwined" in the private actor's leadership, *Brentwood Acad.*, 531 U.S. 288.

The "willful participant in joint activity with the State or its agents" test applied by the Second Circuit began with *Burton*, which held a private restaurant liable for racial discrimination under § 1983 based on its "symbiotic relationship" with the state parking authority from which it leased space in a public building. This Court concluded that "[t]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity," and was particularly disturbed that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a government agency." 365 U.S. at 724-25. On that basis, this Court held both the state and the private restaurant liable under § 1983. However, this Court emphasized the "peculiar facts [and] circumstances"

and explained that "what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with ...." *Id.* at 726. This Court later clarified that *Burton* limited its "actual holding to lessees of public property." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358 (1974).

This Court invoked the "joint participation" test again two decades later in *Lugar*, holding that "a private party's joint participation with state officials in the seizure of disputed property" under a pre-judgment attachment statute was state action. 457 U.S. at 941. As in *Burton*, however, this Court carefully limited its holding: "Contrary to the suggestion of Justice Powell's dissent, we do not hold today that 'a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law.' The holding today, as the above analysis makes clear, is *limited to the particular context of prejudgment attachment.*" *Id.* at 939 n.21 (citation omitted) (emphasis added).

This Court has never again relied on the joint participation theory of *Burton* and *Lugar*, and various opinions have criticized it. In her dissent in *Edmondson v. Leesville Concrete Co.*, joined by Justice Scalia, Justice O'Connor questioned "the continuing vitality of *Burton* beyond its facts." 500 U.S. 614, 636 (1991). And, in her dissent in *Lebron v. National Railroad Passenger Corp.*, Justice O'Connor strongly disapproved of Lebon's argument that Amtrak and the government were "'joint participant[s] in the challenged activity.'" 513 U.S. 374, 409 (1995) (citation omitted). Justice O'Connor explained that:

> [o]ur decision in *Burton*, however, was quite narrow. We recognized "the limits of our inquiry" and emphasized that our decision depended on the "peculiar facts [and] circumstances present." We have since noted that *Burton* limited its "actual holding to lessees of public property," and our recent decisions in this area

> have led commentators to doubt its continuing vitality, *see, e.g.*, L. Tribe, American Constitutional Law § 18-3, p. 1701, n.13 (2d ed. 1988) ("The only surviving explanation of the result in *Burton* may be that found in Justice Stewart's concurrence.").

Id. at 410 (internal citations omitted). In *Sullivan* seven Justices criticized the court of appeals for having "figuratively thrown up its hands and fallen back on language in our decision in *Burton*," explaining that "*Burton* was one of our early cases dealing with 'state action' under the Fourteenth Amendment, and later cases have refined the vague 'joint participation' test embodied in that case." 526 U.S. at 57. The *Sullivan* Court similarly rejected the plaintiffs' reliance on *Lugar*, stating that although *Lugar* "contains general language about 'joint participation' as a test for state action," "its language must not be torn from the context out of which it arose." *Id.* at 57, 58.

The only continuing vitality of the "joint participation" test in this Court's cases, outside the facts of *Lugar* and *Burton*, appears to be in narrowly tailored cases involving express allegations that a private party has conspired with a state official to commit an official act that is obviously unlawful and directly harms the plaintiff. For example, in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), this Court found state action in a conspiracy between a restaurant owner and police officer to discriminate on the basis of race by arresting a white school teacher in the company of African-American students. The object of the conspiracy, and the act directly causing the harm, was an official act that (given the then-settled constitutional and statutory law forbidding such discrimination) no reasonable person could believe to be lawful. Similarly in *Dennis v. Sparks*, this Court held private defendants liable under § 1983 where they bribed a state court judge to issue an illegal injunction. 449 U.S. 24, 25-26 (1980); *see also Tarkanian*, 488 U.S. at 197 n.17 (explaining that *Dennis* involved a "corrupt agreement to perform a judicial act"). As Justice Powell explained in dissent in *Lugar* itself, "*Adickes* establishes that a private

party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity." 457 U.S. at 954-55.

Cohane's complaint does not allege a conspiracy between the NCAA and SUNY-Buffalo for the University to abuse its official power, let alone a conspiracy to commit official acts that no reasonable person could believe were lawful. (That would have been true even under the lax pleading requirements of *Conley*, but it is undeniable after *Twombly*. *See infra*, at 28). While the Complaint alleges isolated, unsupported "bad facts" against individual NCAA employees, *see* Pet. App. 28a-29a, 30a, 31a (Complaint ¶¶ 30, 35, 37, 39), these allegations either assert bare legal conclusions and/or fail to support the notion "that state officials and the [NCAA] reached an understanding to deny [Cohane] his constitutional rights." *Case v. Milewski*, 327 F.3d 564, 568 (7th Cir. 2003). And Cohane "ha[s] not alleged 'specific facts showing an agreement and concerted action amongst the defendants.'" *Rowell v. King*, No. 06-3149, 2007 WL 1207087, at *3 (10th Cir. Apr. 25, 2007) (McConnell, J.) (citation omitted). Nor does Cohane allege that the *official* acts directly caused him harm. *See Dennis*, 449 U.S. at 28; *Tarpley v. Keistler*, 188 F.3d 788, 792 n.2 (7th Cir. 1999) (noting that in *Adickes* and *Dennis* "the state actor's actions unquestionably caused the injury"). As Cohane makes plain, here "[t]he decisive step was the [NCAA's] March 21, 2001 ... Public Infractions Report." Pet.'s Reply Br. at 5, *Cohane v. NCAA*, 215 Fed. Appx. 13 (2d Cir. 2007) (No. 05-5860).

As this Court recognized in *Tarkanian*, the adversarial nature of the NCAA's investigation and enforcement activities precludes any inference of conspiracy from joint action. "[T]he NCAA is properly viewed as a private actor *at odds with the State* when it represents the interests of its entire membership in the investigation of one public university." 488 U.S. at 196 (emphasis added). This investigation was similarly adverse to SUNY-Buffalo's interests, and the University suffered sanctions. Cohane

claims this case is different because SUNY-Buffalo complied with the terms of its membership in the NCAA by cooperating with the investigation, and because that cooperation was allegedly essential to the result. But coach Tarkanian also argued to this Court that UNLV had cooperated with and lent its assistance to the NCAA investigation,[2] and that "the State's involvement is not merely significant, substantial, and pervasive; it is *essential* to enforcement of the NCAA's determination[s] ... Thus, the NCAA *must* utilize state officials to discipline state employees connected with intercollegiate athletics. That utilization makes the NCAA a joint participant in the state action." Br. for the Resp't at 46-47, *Tarkanian*, 488 U.S. 179 (No. 87-1061). This Court rejected all of those arguments in *Tarkanian* and it should do so again here. Surely whether the NCAA's investigations are conducted "under color of law" cannot turn on whether a public university complies with its membership obligations robustly or begrudgingly.

This Court and the lower courts have found the "joint participation" test for state action so troubling because "willful participation in joint activity" between public and private actors is common. It occurs, for example, whenever a private actor invokes routine state assistance (such as by filing a lawsuit or calling the police), or the state chooses to assist private activity for its own reasons (such as by a funding subsidy, or joining a private sports league). This is "a problem that the Court recognized in *Burton* itself," and accordingly since then has adopted "[a] more refined inquiry" such that "[t]he conduct of a private party is not

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[2] Br. for the Resp't at 11, *Tarkanian*, 488 U.S. 179 (No. 87-1061) (pointing to the NCAA's letter to UNLV's president asking for his "cooperation and assistance to the end that complete information related to this matter may be developed"); *id.* at 15-16 (explaining that "the 'burden of proof' is shared jointly by both the NCAA enforcement staff and the institution. It is not a prosecutor-defense legal proceeding; rather, it is a cooperative administrative effort which, when implemented, is designed to place the responsibility for determining the facts on the shoulders of both the institution and the enforcement staff ... to assist the Committee on Infractions in arriving at appropriate judgments").

subject to constitutional scrutiny if the challenged action results from the exercise of private choice ...." *Lebron*, 513 U.S. at 411-12 (O'Connor, J., dissenting). "Given the pervasive role of Government in our society, a test of state action predicated upon public and private 'interdependence' sweeps much too broadly and would subject to constitutional challenge the most pedestrian of everyday activities." *Id.* at 411. The Second Circuit's conclusion that the NCAA would be liable under § 1983 if Cohane "could show that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty," Pet. App. 5a, committed precisely the error for which this Court criticized the Third Circuit in *Sullivan*: relying on the "general language" of *Burton* and *Lugar*, "torn from the context out of which it arose." Indeed, petitioners respectfully submit that this Court's limitations on the "joint participation" theory, and its application of these principles in this specific context in *Tarkanian*, are clear enough that summary reversal would be appropriate here.

B. The Second Circuit's Application Of The Joint Participation Test Conflicts With The Law Of Other Circuits

The Second Circuit's decision in this case also conflicts with the law of other circuits and highlights the considerable confusion and disarray that have been produced by this Court's inconsistently applied pronouncements about the "joint participation" test. Even prior to *Cohane*, the Second Circuit rejected this Court's efforts to limit *Lugar*, holding that "[t]o limit the *Lugar* rationale to prejudgment attachments would violate the precept that § 1983 provides a remedy 'as broad as the protection of the Fourteenth Amendment affords the individual.'" *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1146 (2d Cir. 1986) (citation omitted), *rev'd on other grounds*, 481 U.S. 1 (1987). Several circuits, however, including at least the First, Third, and Fourth, have questioned the continuing vitality of the joint participation test. The Fourth Circuit has held that *Burton* and *Lugar* are both confined to their facts and that the joint

participation test has no broader application. The Fifth and Sixth Circuits have explicitly limited the holding of *Lugar* to the narrow context of prejudgment attachment.

In *DeBauche*, the Fourth Circuit considered a claim by a candidate for governor that she had been unconstitutionally excluded from a debate organized by former governor Douglas Wilder with the help of Virginia Commonwealth University, and that Wilder and several radio stations were liable as a "joint participants" with VCU. The Fourth Circuit explained that "DeBauche's argument does not account for the actual holding in *Burton* nor the Supreme Court's later refinements which explain what is required to convert private action into state action," and that *Burton* "certainly does not stand for the proposition that all public and private joint activity subjects the private actors to the requirements of the Fourteenth Amendment." 191 F.3d at 507. The court held that a private party is deemed to be a state actor under only four circumstances:

> (1) when a state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.

Id. It then explained that "[h]owever these facts are characterized, the arrangement described between the state actors and private actors does not transform the private actors' conduct into state action." *Id.* at 508. Cohane obviously could not have satisfied any of the Fourth Circuit's "exclusive" tests for state action, yet the NCAA is forced to defend such claims in the Second Circuit.

Other circuits have been less clear in delineating the "exclusive" circumstances that will support a state action finding, but have nonetheless made clear that the "joint participation" language of *Burton* and *Lugar* should not be extended beyond the facts of those cases. In *Crissman v.*

Dover Downs Entertainment Inc., the *en banc* Third Circuit held that "while *Burton* remains good law, it was crafted for the unique set of facts presented, and we will not expand its reach beyond facts that replicate what was before the Court in *Burton*." 289 F.3d 231, 242 (3d Cir. 2002). The First Circuit refused to find a private basketball league liable under § 1983 based on its "joint participation" with county officials in running basketball tournaments, explaining that in later cases this Court "has either distinguished or ignored *Burton*'s broadest language." *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 20 (1st Cir. 1999). And the Fifth and Sixth Circuits have held that *Lugar* is limited to the context of prejudgment attachment. *See Davis Oil Co. v. Mills*, 873 F.2d 774, 780 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989) ("[t]o the extent that *Lugar* adopts a low threshold to establish joint participation between a private party and the state, its holding has been confined to the context of ex parte prejudgment proceedings."); *Revis v. Meldrum*, --F.3d--, No. 06-5197, 06-5399, 2007 WL 1146460, at *14 (6th Cir. Apr. 19, 2007) (declining "to extend the relatively low bar of *Lugar*'s so-called 'joint action' test outside the context of challenged prejudgment attachment or garnishment proceedings"); *Hill v. Langer*, 86 Fed. Appx. 163, 167 (6th Cir. 2004) ("the 'joint action' theory adopted in *Lugar* is an exception limited to prejudgment attachments, and we reject [the] invitation to expand this exception beyond those narrow limits"). None of those circuits would have allowed these allegations to proceed.

The law in still other circuits reflects considerable disarray and *ad hoc* blending of "joint action" and true conspiracy principles. For example, the Tenth Circuit applies a "joint action" test which "examine[s] whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995). In *Gallagher*, the court canvassed the approaches in the court of appeals, explaining that some courts employ a "conspiracy approach" where "state action

may be found if a state actor has participated in or influenced the challenged decision or action," while others "hold that, if there is a 'substantial degree of cooperative action' between state and private officials, or if there is 'overt and significant state participation' in carrying out the deprivation of the plaintiff's constitutional rights, state action is present." *Id.* at 1454 (citations omitted). This confusion illustrates the need for this Court's review.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE NCAA DID NOT ACT "UNDER COLOR OF LAW"

A. A Finding of "State Action" By SUNY-Buffalo Does Not Establish That The NCAA Acted "Under Color Of Law"

Even if the assistance provided by SUNY-Buffalo to the NCAA's investigation was significant enough that it would be fair to say "the State is *responsible* for the specific conduct of which the plaintiff complains," *Blum*, 457 U.S. at 1004, that might justify holding *the state* responsible for the allegedly defamatory consequences of the otherwise private NCAA Report—but it cannot possibly justify imposing § 1983 liability on *the NCAA* in the absence of any showing that the NCAA itself did anything other than proceed with its ordinary investigative processes, which this Court has already held to be private in nature. Snyder, *Private Motivation*, 75 Cornell L. Rev. at 1063 ("Separating state action from private action is necessary," not only to determine whether a violation of the fourteenth amendment has occurred, but also to "allocate" liability properly.); Tribe, *American Constitutional Law* § 18-1, at 1689 n.10 (2d ed. 1988) (explaining that it is "sometimes relevant" to consider "the target of the remedy sought by the litigant challenging an alleged state action"). Remarkably, however, an ill-considered generalization in this Court's opinion in *Lugar* has makes it difficult for the lower courts to draw such sensible distinctions. *See Snyder, Private Motivation*, 75 Cornell L. Rev. at 1075 (describing *Lugar*'s "artificial and needlessly confusing approach"). Over a strong and

persuasive dissent by Justice Powell, joined by Justices O'Connor and Rehnquist, this Court suggested in *Lugar* that any conduct that is "state action" is also therefore action "under color of law" by the private party for § 1983 purposes. That reasoning was unnecessary to the result in *Lugar*,[3] and has profoundly unfair consequences. This Court should correct the misapprehensions it has produced.

A person ordinarily acts under color of law only if he has "exercised 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (citation omitted). "State action" and action "under color of law" are obviously closely related concepts, and in the great majority of § 1983 cases the generalization in *Lugar* is either correct or harmless. If the plaintiff seeks only declaratory or injunctive relief against an unconstitutional law or policy, whether the defendant is a private actor or a state official is of little consequence. And if a state official is the only party alleged to have violated the plaintiff's rights, or when the plaintiff "seeks to hold state officials liable for the actions of private parties" because the state's involvement makes it "*responsible* for the specific conduct of which the plaintiff complains," *Blum*, 457 U.S. at 1003-04, then the official clearly acted "under color of law" and is a proper defendant.

But this Court recognized in *Blum* that ordinary § 1983 cases against public officials are "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State." 457 U.S. at 1003; *id.* at 1009 n.20 (stating that *Blum* "of course, does not involve the 'under color of law' requirement of § 1983"). The problem is simple

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[3] Pre-judgment attachment allows private parties to exercise what is tantamount to a traditional state power without any meaningful oversight by the state officials themselves. A finding that the private party acted "under color of law" could be justified in those terms (although Justice Powell's dissent is powerful). This Court has held that *Lugar* is limited to the "unique" context of pre-judgment attachment, supporting that view.

and intuitive. Even if a court determines that private action "must in law be deemed to be that of the State," *id.* at 1004, and that the state can "fairly be blamed" for it, *Lugar*, 457 U.S. at 936, the private party may have wielded no power "made possible only because the wrongdoer is clothed with the authority of state law," *West*, 487 U.S. at 49, and holding the private party liable in damages may be patently unjust. Cohane is now pursuing a separate action against University officials. *See Cohane v. Greiner*, No. 03-CV-0322 (E.D.N.Y filed Jan. 17, 2003).

Imagine a state official who "exercis[es] coercive power" to force a private employer to fire an employee because the official disapproves of the employee's speech. The official has violated the First Amendment, but the employer has done only what it had every right to do if the state were not involved—and the state involvement that makes the firing into a constitutional issue was beyond the employer's control and against its will. And as Justice Powell saw the facts in *Lugar*, the defendant "did no more than commence a legal action of a kind traditionally initiated by private parties" and "could have had no notion that his filing of a petition in state court, in the effort to secure payment of a private debt, made him a 'state actor' liable in damages for allegedly unconstitutional action by the Commonwealth of Virginia." 457 U.S. at 945-46. If one views *ex parte* attachment procedures that way, Justice Powell was correct that the private party should not be liable.

As Justice Powell explained, "[w]here private citizens interact with state officials in the pursuit of merely private ends," a reviewing court must determine whether the "allegation of wrongful 'conduct that can be attributed to the State'" for purposes of state action "fairly can be attributed to the [private defendant]" as well. *Id.* at 948. In other words, the court must determine whether the private party is fairly responsible for the state-power aspects of the joint activity that caused the court to find state action. If not, there may be joint private/public activity, and state action by the state, but no state action or action "under color of

law" for which the private party is responsible. *See* Snyder, *Private Motivation*, 75 Cornell L. Rev. at 1094 ("private and state action may intersect and result in the deprivation of constitutional rights ... [b]ut the state action and private conduct must be separated analytically"). One can say either that the private party has not engaged in "state action" or become a "state actor," or that he has done nothing "under color of law;" the wording matters little, and Justice Powell uses both formulations. The critical point is that the private party may not be responsible for any constitutional injury even if (perhaps especially if) it is that private party's own conduct that supplies the "state action" by the state official. In the employer hypothetical above, for example, the employer's firing is state action but (due to official coercion) it is state action or action "under color of law" *attributable to the state official* rather to the employer.

The Fourth Circuit's opinion in *Lugar* (described by Justice Powell as "excellent"), correctly explained that "joint participation" cases require "separate consideration of the two requirements. ... [T]he involvement of a state official provides ... the state action ... but it does not resolve nor even touch upon the further question whether the private defendant's contributing conduct was taken under color of law." 639 F.2d 1058, 1064 (4th Cir. 1981); *see also id.* at 1065 ("to find state action 'provided' in this pattern by the 'involvement' of state officials in the totality of conduct that resulted in a deprivation of [a] secured right does not decide, nor even address, the separate question whether the private conduct of a particular defendant which was also involved to some extent was under color of state law"). Justice Powell and the other dissenters agreed with the Fourth Circuit that by conflating the two inquiries, "the Court undermines fundamental distinctions between the common-sense categories of state and private conduct and between the legal concepts of 'state action' and private action 'under color of law.'" 457 U.S. at 946.

Lugar has confused the lower courts because the opinion seems to suggest that if a private party's conduct is state

action (*i.e.*, if it is "fairly attributable" to the state) then the private party is automatically responsible for that state action and has acted "under color of law" for purposes of § 1983. Any such suggestion was unnecessary to the result in *Lugar*, is plainly incorrect, and should be rejected. The correct analysis in "joint participation" settings is that where a private party does not wield any delegated state power he acts "under color of law" only if he conspires with state officials to induce them to violate their official duties, as in *Dennis*, or "when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity," *id.* at 955 (discussing *Adickes*). As explained above, Cohane does not genuinely allege anything like that.

B. The Circuits Are In Conflict About The Relationship Between State Action And Private Action "Under Color Of Law"

The majority's apparent conflation of the "state action" and "under color of law" inquiries in *Lugar* produces results that are so plainly unjust in certain settings that various courts of appeals have declined to read *Lugar* to require that conclusion. There is an active circuit split over whether a finding of state action necessarily justifies the conclusion that the action was "under color of law" sufficient to impose § 1983 liability on a private actor. If this case had arisen in the Seventh, Ninth, or Third Circuits, for example, it would have been dismissed on the ground that even if state action is present the NCAA is not a proper defendant.

The Seventh Circuit has refused to hold that a private party is a proper defendant in a § 1983 action involving allegations of "joint participation," notwithstanding the clear presence of state action by a state official, unless the private conduct falls within two categories. *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002). First, a private party may be held liable for conspiring with a state official to commit an official act that directly deprives the plaintiff of her constitutional rights (*e.g. Dennis* or *Adickes*), or "[s]econd, the private citizen may have become a public

officer pro tem." *Id.* Judge Posner, writing for the court, rejected the dissent's argument that under this Court's cases (particularly *Lugar*) the private party was liable because it and the state official "engaged in concerted action with a common goal." *Id.* at 509 (dissent). The dissent argued that the private party could be held liable if "the state ... is aware of the participation of the private individual and 'effectively directs, controls, or encourages the actions of the private party.'" *Id.* at 510 (dissent) (citations omitted). In short, the dissent argued that the test for determining whether the private party acted under color of law is the same as for whether the state is responsible for the private conduct. The majority wisely rejected this argument. This case would have to be dismissed under its reasoning.

Several court of appeals cases have embraced the insight that if state action is found on the ground that government officials *coerced* the private conduct, that should support an action against the state but not against the private party. The Ninth Circuit explained that "[t]he [*Blum*] compulsion analysis originated in cases in which the government itself, not a private entity, was the defendant," and holds only that when the government compels a private party to act, *the government* can be held liable under § 1983 for the private conduct. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 836 (9th Cir. 1999). In *Sutton*, "Plaintiff did not bring this action against the [] government ... [instead] he sued a private employer." *Id.* at 837. The plaintiff argued, consistent with *Lugar*, that if the employer's conduct is state action under *Blum*, that is also enough "to hold [the] private employer responsible" under § 1983. *Id.* The Ninth Circuit sensibly disagreed, explaining that *Blum*'s compulsion test establishes "that *the government* cannot escape liability when it compels a result, even though the government does not actually engage in the unlawful act but, instead, pressures another to do so. In such circumstances, the state is undeniably the party who is 'responsible' for that act. By contrast, in a case involving a

private defendant, the mere fact that the government compelled a result does not suggest that the government's action is 'fairly attributable' to the private defendant." *Id.* at 838. That was Justice Powell's reasoning in dissent in *Lugar*, and it applies with equal force where (as here) a plaintiff seeks to hold a private party liable under a "joint participation" theory. The Ninth Circuit would therefore dismiss this case on the ground that SUNY-Buffalo's state action is not "fairly attributable" to the NCAA.

The Third Circuit has also recognized that it would be illogical to hold that a private party is a proper defendant where the state has coerced or encouraged the private party into acting. *See Harvey v. Plains Township Police Dep't*, 421 F.3d 185, 195 (3d Cir. 2005), *cert. denied*, 125 S. Ct. 2325 (2006). The Court "stress[ed] that by stating that a private actor is not engaged in state action simply because she is compelled to take an action by a state actor, we are not suggesting that the action itself may not be attributed to the state. Indeed, it seems entirely proper to find that the state actor engaged in state action, including whatever actions the private party was compelled to undertake." *Id.* at 195 n.13. That makes perfect sense, but it is hard to reconcile with the majority's language in *Lugar*.

In conflict with the Third, Seventh, and Ninth Circuits, some circuits, including the Second, Fifth and Eleventh, have held that *Lugar* precludes such distinctions. The Second Circuit has previously held both that "[i]n order to satisfy the state action requirement where the defendant is a private entity, the allegedly unconstitutional conduct must be 'fairly attributable' to the state," *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir.), *cert. denied*, 539 U.S. 942 (2003), and that "[i]f a defendant's conduct satisfies the state action requirement under the Fourteenth Amendment, then that conduct also constitutes action 'under color of' state law for purposes of § 1983," *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 229 (2d Cir. 2004). The Second Circuit apparently followed that circuit precedent here as well; after finding sufficient allegations of "willful

participation" by the University it did not separately analyze whether Cohane alleged action by the NCAA "under color of law."

Similarly, the Eleventh Circuit has explained that "[w]hile specifically the *Blum* court spoke of holding the state liable pursuant to the state action doctrine, the standard remains constant when a party seeks to hold a private actor liable under the state action doctrine." *NBC v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1025 n.4 (11th Cir. 1988). The Fifth Circuit has held that "*Blum* ... involved an effort to hold state officials liable for the conduct of private parties .... While the present suit ... [involves a private defendant], the analysis of state action under either brand of facts is largely if not wholly the same." *Frazier v. Bd. of Trustees*, 765 F.2d 1278, 1284-85 n.12 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986). In *Perkins*, 196 F.3d at 17-19, the First Circuit stated that "the Fourteenth Amendment's 'state action' requirement is coextensive with section 1983's 'under color of law' requirement" and it applied ordinary state action tests to determine whether a private basketball club could be held liable under § 1983. 196 F.3d at 17-19 n.1. The Eighth and Sixth Circuits have applied the same misguided reasoning. *See Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) ("If a party's conduct meets the requirements for state action, the same acts also qualify as actions taken 'under color of state law' for purposes of § 1983"); *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004) ("When a defendant is a private entity, this circuit recognizes three tests for determining whether its conduct is fairly attributable to the state ...."); *Tahfs v. Proctor*, 316 F.3d 584, 591 (6th Cir. 2003) (applying tests for determining whether conduct is fairly attributable to the government to determine whether private party acted under color of law).

C. Cohane Does Not Allege Action By The NCAA "Under Color Of Law"

Cohane does not allege any facts that would establish

that the NCAA is responsible for SUNY-Buffalo's state action or that the NCAA issued its Infractions Report under color (or "pretense," *see Screws v. United States*, 325 U.S. 91, 111 (1945)) of law. The NCAA did not "exercise[] 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *See West*, 487 U.S. at 49 (citation omitted). Its ability to issue a report of its investigation into a violation of its rules is not made possible only because it is clothed with some state authority; nor can it be said that the NCAA "brought the force of the State to bear against the § 1983 plaintiff." *See Blum*, 457 U.S. at 1013 (Brennan, J., dissenting). This Court has already held that when the NCAA investigates and enforces its rules against a particular school, it does not act under color of law. As in *Tarkanian*, there is nothing in this case that could establish that the NCAA "carr[ied] a badge of authority of [the] State [of New York] and represent[ed] it in some capacity." 488 U.S. at 191 (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). Any injury to Cohane's reputation is—as he makes plain—directly the result of the *NCAA's private report*, and the NCAA did not issue its report under color of law. Despite Cohane's conclusory allegations about the joint press conference, the NCAA was not acting for the university and the persuasiveness of its report certainly was not enhanced by any special power conferred by the state.

The closest Cohane comes to an allegation that the NCAA acted "under color of law" is his bare allegation that SUNY-Buffalo officials were somehow acting under the "control" of the NCAA when they allegedly pressured students to cooperate with the NCAA's evidence-gathering. But a careful review of Cohane's complaint reveals that the "control" he alleges is simply the University's own desire to comply with the NCAA bylaws and remain a member of the Association. This Court has already held that the NCAA does not control or coerce public universities in any manner that would make the NCAA *responsible* for the university's conduct, merely because the consequences of withdrawing

from the NCAA are unpalatable. Coach Tarkanian argued that "the power of the NCAA is so great that UNLV had no practical alternative to compliance with its demands." *Tarkanian*, 488 U.S. at 198. This Court acknowledged that "nonmembership in the NCAA obviously would thwart" UNLV's "desire to remain a powerhouse among the Nation's college basketball teams," but "that UNLV's options were unpalatable does not mean that they were nonexistent." *Id.* at 198 & n.19. And "even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law." *Id.* at 198-99. This Court also squarely rejected the notion that its public university members "delegate" state power to the NCAA in any meaningful sense. "UNLV delegated no power to the NCAA to take specific action against any university employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself." *Id.* at 195-96.

Even if Cohane's allegations are accepted as true and SUNY-Buffalo officials warned students that a refusal to cooperate with an NCAA investigation could imperil their degrees, SUNY-Buffalo issued those warnings not the NCAA. The Second Circuit tried to distinguish *Tarkanian* on the ground that there "'[t]he NCAA enjoyed no governmental powers to facilitate its investigation,'" whereas here "Cohane specifically alleges that the University used its authority to compel witnesses to testify against him just as if they had been compelled by subpoena." Pet. App. 5a (citation omitted). But in the absence of sufficient allegations of a conspiratorial agreement, the fact that the University exercised state power does not mean the NCAA did. The NCAA itself did nothing more than participate in interviews, receive evidence, and issue the report that Cohane contends defamed him. If misconduct by SUNY-Buffalo "caused" the NCAA to issue its report (in the narrow sense that, as Cohane alleges, the NCAA would

not have been able to complete its investigation "but for" that misconduct), that might justify a conclusion that the damages recoverable against SUNY-Buffalo embrace all of the foreseeable consequences of its alleged misconduct. But none of this means that the NCAA itself assumed any state authority or did anything "under color of law."

III. AT A MINIMUM, THIS COURT SHOULD GVR IN LIGHT OF *TWOMBLY*

If this Court does not grant certiorari in this case or summarily reverse, the NCAA respectfully submits that it should grant, vacate, and remand the Second Circuit's decision in light of *Twombly*. The Second Circuit explained that it could affirm the district court's judgment only if "'it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.'" Pet. App. 2a (citation omitted) (emphasis added). It then went on to hold "that the District Court erred in concluding that Cohane could prove *no set of facts*" to satisfy the "joint participation" test. *Id.* at 3a (emphasis added). This "no set of facts" language comes from *Conley v. Gibson*, but in *Twombly* this Court held that "this famous observation has earned its retirement." 127 S. Ct. at 1969.

Twombly was an antitrust conspiracy case in which the plaintiff had alleged a "'compelling common motivation,'" *id.* at 1962 (citation omitted), that the defendants "'entered into a contract, combination or conspiracy,'" and that the defendants "'agreed not to compete with one another.'" *Id.* at 1970 (citations omitted). This Court found these allegations insufficient and reversed the Second Circuit. It held that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65. Instead, stating an antitrust conspiracy claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965. "[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 1966.

This Court explained that *Conley*'s "'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard." *Id.* at 1968. Like this case, *Twombly* arose in the Second Circuit, and the court of appeals held that to dismiss the complaint "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion ...." *Id.* at 1963 (citations omitted). This Court explained that on the Second Circuit's "focused and literal reading of *Conley*'s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever pleadings left open the possibility that a plaintiff might later establish some 'set of undisclosed facts' to support recovery." *Id.* at 1968-69 (alteration omitted).

Cohane's complaint is just like Twombly's. It uses labels and conclusions, and a formulaic recitation of the elements of a cause of action, but it does not allege any *facts* that would suggest a genuine conspiracy between the NCAA and SUNY-Buffalo to jointly participate in depriving Cohane of his rights. Cohane makes all sorts of conclusory allegations, but has no factual support for any of them. He alleges that school officials were under the "control" of the NCAA, but never specifies how or in what sense or identifies any relevant facts. He alleges that in the course of its investigation the NCAA used and relied upon information that it knew to be "coerced, false and otherwise tainted"—but he never specifies what that information was, why it was false, or how it was otherwise tainted. He alleges that the NCAA and school officials "did engage in a wrongful pattern of wrongful conduct and actions"—but he does not explain precisely what this conduct might have been (other than the cooperative investigative and enforcement process required by NCAA bylaws and found unobjectionable by

this Court in *Tarkanian*), and he certainly does not identify any facts that would support a conclusion that this alleged wrongful conduct was the product of an unlawful conspiracy. The Complaint is woefully insufficient under *Twombly*.

IV. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE THAT MERIT REVIEW

Cohane's allegations add nothing to Tarkanian's, and can be pled by any coach or player who believes himself harmed by the results of an NCAA investigation of a public institution. The prospect of costly and time consuming discovery (and fee awards under §1983) based on "joint participation" theories would have a crippling effect on the NCAA's ability to regulate college athletics nationwide. The Second Circuit noted that "the NCAA may be able to rebut [Cohane's] claims" after discovery. Pet. App. 5a. But the proper time to address these deficiencies is now, as the district court did, on the NCAA's motion to dismiss. *See, e.g., Sullivan*, 526 U.S. 40 (reviewing state action decision after 12(b)(6) dismissal); *Lugar*, 457 U.S. 922 (same); *Polk County v. Dodson*, 454 U.S. 312 (1981) (same); *Dennis*, 449 U.S. 24 (same); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (same). "It is no answer to say," as this Court recognized in *Twombly*, "that a claim just shy of plausible entitlement to relief can, if groundless, be weeded out early in the discovery process," or at summary judgment or trial. 127 S. Ct. at 1967. Allegations of joint participation in this context must fail as a matter of law. Allowing them to proceed past the motion to dismiss stage will intolerably invade the sphere of private freedom that the state action and "under color of law" doctrines are supposed to protect, will mire the NCAA in endless and unnecessary litigation, and will force the NCAA to conduct all of its investigations (and other operations) under the shadow of constitutional requirements that were never meant to apply to private entities.

CONCLUSION

The petition for certiorari should be granted, and the judgment should be reversed or vacated for reconsideration.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIMOTHY M. COHANE, PLAINTIFF-APPELLANT,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, BY AND THROUGH ITS PRESIDENT, MYLES BRAND, TOM HOSTY, AS AN NCAA ENFORCEMENT DIRECTOR AND AS AN EMPLOYEE OF THE NCAA, STEPHANIE HANNA, AS AN NCAA ENFORCEMENT DIRECTOR AND AS AN EMPLOYEE OF THE NCAA, JACK FRIEDENTHAL, AS AN EMPLOYEE OF THE NCAA AND FORMER CHAIRMAN OF THE NCAA COMMITTEE ON INFRANCTIONS, DEFENDANTS-APPELLEES.

No. 05-5860-cv

Jan. 25, 2007

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215 Fed. Appx. 13

Appeal from a final decision of the United States District Court for the Western District of New York (William M. Skretny, Judge).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is hereby **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for proceedings consistent with this order.

PRESENT: Hon. CHESTER J. STRAUB, Hon. RICHARD C. WESLEY, Circuit Judges, Hon. STEFAN R. UNDERHILL,* District Judge.

SUMMARY ORDER

Plaintiff-Appellant Timothy M. Cohane appeals from a final order entered in the United States District Court for the Western District of New York (William M. Skretny, *Judge*), granting the motion to dismiss of Defendant-Appellee National Collegiate Athletic Association ("NCAA") and its employees involved in the NCAA's investigation of the State University of New York at Buffalo (the "University")—Defendants-Appellees Myles Brand, Stephanie Hanna, and Jack Friedenthal. The relevant facts and allegations of the complaint are fully set forth in the District Court opinion, with which we presume familiarity. *See Cohane v. NCAA*, No. 04-cv-181S, 2005 WL 2373474 (W.D.N.Y. Sept. 27, 2005).

We review the District Court's grant of the NCAA's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) *de novo*, accepting all the material allegations of the complaint as true and affirming the dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir.2002) (internal quotation marks omitted). "This rule applies with particular force where the plaintiff alleges civil rights violations...." *Id.* (internal quotation marks omitted). "The appropriate inquiry is not whether a plaintiff is likely to prevail, but whether he is entitled to offer evidence to support his claims." *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir.2005).

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* Honorable Stefan R. Underhill of the United States District Court for the District of Connecticut, sitting by designation.

Statute of Limitations

On appeal, Cohane has abandoned his claims that his forced resignation on December 3, 1999, deprived him of his *property* interest in his position as the head coach of the men's basketball team at SUNY Buffalo. Instead, he argues that the NCAA's March 21, 2001 report of its investigation (the "Report") and the University's ratification of the Report's findings, defamed him and destroyed his ability to pursue his chosen occupation. Count I alleges damages arising from the imposition of the sanctions by the NCAA in the Report is, therefore, timely. All claims for injuries occurring prior to March 19, 2001, however, are time barred. Given Cohane's specification of the Report as the instrument that caused the deprivation of his liberty interest, we reject the claim that Cohane has "has experienced a continuous practice and policy of discrimination," sufficient to toll "the commencement of the statute of limitations period ... until the last discriminatory act in furtherance of it." *Fitzgerald v. Henderson*, 251 F.3d 345, 359 (2d Cir.2001) (internal quotation marks and citations omitted), *cert. denied*, 536 U.S. 922, 122 S.Ct. 2586, 153 L.Ed.2d 776 (2002).

Further, for substantially the reasons stated by the District Court, Count II of the complaint for tortious interference with Cohane's contractual relationship with the University is time barred. *See Cohane*, 2005 WL 2373474, at *7-8.

State Action

We hold that the District Court erred in concluding that Cohane could prove no set of facts showing that the NCAA was a "willful participant in joint activity with the State," *see Brentwood Academy v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (internal quotation marks omitted), to deprive him of his liberty, to pursue his chosen occupation, without due process of law, *see Donato v. Plainview-Old Bethpage Cent.*

Sch. Dist., 96 F.3d 623, 630 (2d Cir.1996) (internal quotation marks omitted), *cert. denied*, 519 U.S. 1150, 117 S.Ct. 1083, 137 L.Ed.2d 218 (1997). Specifically, the District Court, relying on the Supreme Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988), held that the complaint failed to plead sufficiently the NCAA's "joint activity" with the University. The plaintiff in *Tarkanian* asserted that The University of Nevada at Las Vegas's ("UNLV") cooperation with the NCAA's investigation made the latter an agent of the State. 488 U.S. at 196, 109 S.Ct. 454. The Supreme Court rejected this claim because "the notion that UNLV's promise to cooperate in the NCAA enforcement proceedings was tantamount to a partnership agreement or the transfer of certain university powers to the NCAA is *belied by the history of this case.*" *Id.* (emphasis added). In *Tarkanian*, the Supreme Court noted that during the NCAA's investigation, UNLV "denied all of the allegations" and maintained "that Tarkanian was completely innocent of wrongdoing." *Id.* at 185, 109 S.Ct. 454. The Court concluded that "the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth." *Id.* at 196, 109 S.Ct. 454.

The facts relied on by the Supreme Court in *Tarkanian* were found by a Nevada state court following a two-week bench trial. *See id.* at 188, 109 S.Ct. 454. In contrast, the District Court, in this case, was required to accept all of the allegations in Cohane's complaint as true, including those describing a pattern of collusion between the University and the NCAA. In particular, the complaint alleges that the University forced Cohane's resignation immediately upon learning of the charges in an attempt to placate the NCAA (Compl. ¶¶ 27-30), actively participated in the case against Cohane in the hearings held by the Mid-American Conference and the NCAA (*id.* ¶¶ 31-33, 37), intimidated student-witnesses into giving false statements to NCAA

investigators by threatening to wrongfully withhold their degrees (*id.* ¶¶ 35-36), suborned perjury at the NCAA hearing (*id.* ¶ 37), and adopted the Report and its findings thereby placing its *imprimatur* upon the defamatory statements and penalties imposed on Cohane (*id.* ¶¶ 38, 41). The allegations that the University abused its authority to confer or withhold degrees, but also that this abuse of power improperly pressured students into providing false testimony (Compl. ¶¶ 35-36), distinguish this case from *Tarkanian*, where "there [was] no suggestion of any impropriety respecting the agreement between the NCAA and UNLV." 488 U.S. at 197 n. 17, 109 S.Ct. 454. Further in *Tarkanian*, "[t]he NCAA enjoyed no governmental powers to facilitate its investigation," including the power to subpoena witnesses. *Id.* at 197, 109 S.Ct. 454. Cohane specifically alleges that the University used its authority to compel witnesses to testify against him just as if they had been compelled by subpoena.

These non-conclusory allegations combined with the others in the complaint, if proven, could show that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty. Cohane could show that without the State's assistance and the exercise of its coercive authority upon the student witnesses, the NCAA could not have issued the defamatory report and imposed sanctions on Cohane. Certainly, the NCAA may be able to rebut these claims and show that it did not engage in concerted action with the University, but at this point in the litigation, it was error for the District Court to interpret *Tarkanian* as holding categorically that the NCAA can never be a state actor when it conducts an investigation of a state school.

For the foregoing reasons, the judgment of the District Court is hereby **AFFIRMED** in part, and **REVERSED** in part. This case is remanded for further proceedings consistent with this order.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

TIMOTHY M. COHANE, PLAINTIFFS,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, TOM HOSTY, STEPHANIE HANNA, AND JACK FRIEDENTHAL, DEFENDANTS

No. 04-CV-181S

Sept. 27, 2005.

2005 WL 2373474

SKRETNY, J.

DECISION & ORDER

I. INTRODUCTION

In this case, Plaintiff Timothy Cohane, a former basketball coach, alleges that Defendants deprived him of his liberty interest in his reputation without due process of law in violation of 42 U.S.C. § 1983. In addition, Plaintiff alleges that Defendants tortiously interfered with his contractual relationship with the State University of New York at Buffalo ("SUNY Buffalo"). Currently before this Court is Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. BACKGROUND

A. Facts

The following facts, which are alleged in the Complaint, are assumed true for purposes of the instant motion. Plaintiff served as head coach of the men's intercollegiate National Collegiate Athletic Association ("NCAA") Division I basketball team at SUNY Buffalo from 1993 through December 3, 1999. (*Compl.*, ¶ 5). The NCAA, an unincorporated association, is charged with marketing, governing, controlling and operating the multi-billion dollar college sports industry, including all aspects of intercollegiate sports and athletics departments operating at SUNY Buffalo. (*Compl.*, ¶¶ 6 & 8). Plaintiff alleges that Tom Hosty and Stephanie Hanna acted as directors of the NCAA enforcement staff, and that Jack Friedenthal acted as Chairman of the NCAA's Committee on Infractions during the time relevant to this action. (*Compl.*, ¶¶ 10, 11).

After SUNY Buffalo hired Plaintiff as the head coach of its men's basketball team in 1993, the team progressed from an NCAA team without a league to the East Coast Conference, and finally to the Mid American Conference. (*Compl.*, ¶ 25). On January 29, 1999, SUNY Buffalo approved Plaintiff's contract extension through April 13, 2002. (*Compl.*, ¶ 26). On August 9, 1999, Rob Fournier ("Fournier"), a Mid American Conference employee, authored and signed a letter to the NCAA, wherein he confirmed his prior phone call to the NCAA on August 3, 1999, regarding an alleged infraction, and referred to documentation that SUNY Buffalo had provided. (*Compl.*, ¶ 27). Specifically, the letter stated as follows:

> "As a consequence of the sensitive personal and private issues to be protected, the Conference will undertake this process in the coming weeks by submitting affidavits, interviewing affected parties, and insuring due process.... Toward that end, we will utilize when necessary the full

> services and cooperation of personnel at the University at Buffalo including New York State legal counsel."

(*Compl.*, ¶ 27).

On December 3, 1999, Plaintiff attended a meeting during which SUNY Buffalo's counsel advised him that according to the NCAA, it was assumed that he was guilty of major NCAA rule violations, and that he and his staff should be forced to resign. (*Compl.*, ¶ 28). Plaintiff was forced to resign that day pursuant to a written contract that included a release for any actions committed by Plaintiff on or before October 3, 1999. (*Compl.*, ¶¶ 28, 64). On December 22, 1999, Fournier advised SUNY Buffalo on behalf of MAC and NCAA that although Cohane's departure was characterized as a resignation, "it has the effect of a change of leadership." (*Compl.*, ¶ 30).

Between January 16, and 18, 2000, the MAC Committee on Infractions held a hearing at which representatives of the MAC schools judged the MAC investigation and report issued by Fournier. (*Compl.*, ¶ 31). SUNY Buffalo officials and representatives of the NCAA participated in the case against Plaintiff. (*Compl.*, ¶ 31). According to a December 7, 1999 notification, the MAC adopted the procedures of Article 32 of the NCAA by-laws, which govern such investigations, including issues related to conflicts of interest, information gathering, verification and access to records, and disclosure of information. (*Compl.*, ¶ 29, 34).

In the Spring of 2000, after the completion of the basketball season and after some of the student athletes had exhausted their NCAA eligibility, the NCAA enforcement staff requested interviews with the student athletes to discuss Plaintiff. (*Compl.*, ¶ 35). When the student athletes refused to interview, SUNY officials threatened that if they did not comply with the NCAA's request, the issuance of their degrees would be at risk. (*Compl.*, ¶ 35).

On January 29, 2001, Defendants Hosty and Hanna issued a case summary to be used by the NCAA Committee on Infractions during a hearing scheduled for February 9, 2001. (*Compl.*, ¶ 36). In preparing the case study, Defendants used and relied upon information provided by SUNY officials, including affidavits which Defendants allegedly knew contained coerced, falsified or otherwise tainted information. (*Compl.*, ¶ 36). At the February 9, 2001 hearing, Defendants acted in conjunction with SUNY officials to introduce this tainted and false evidence against Plaintiff. (*Compl.*, ¶ 37).

In a written press and internet report dated March 21, 2001 ("Infractions Report"), the NCAA and Chairman Friedenthal found that Plaintiff had acted "evasive, deceptive and not credible" and "contrary to the principles of ethical conduct." (*Compl.*, ¶ 38). Specifically, the NCAA found Plaintiff guilty of "major violations" for conduct that it has uniformally ruled to constitute "minor violations" in over 300 cases before and since. (*Compl.*, ¶ 39). Based on these findings, the NCAA sanctioned Plaintiff by prohibiting him from coaching at any NCAA school. (*Compl.*, ¶ 38). Immediately following the release of the NCAA report, the NCAA and SUNY held a joint press conference, at which school officials declared that "[SUNY] accepts the report and its findings in its entirety." (*Compl.*, ¶ 41). Plaintiff requested but was denied participation in the joint press conference. (*Compl.*, ¶ 41).

On August 20, 2001, the NCAA Appeals Committee ("Appeals Committee") reviewed the findings of the March 21, 2001 report, and on October 12, 2001, reprimanded the Committee on Infractions, stating that "many aspects of the case were troublesome." (*Compl.*, ¶¶ 43, 44). Specifically, the Appeals Committee reprimanded the Committee on Infractions for not interviewing key witnesses, conducting an inconsistent investigation, and employing troublesome language and rationale regarding its findings of unethical

conduct. (*Compl.*, ¶ 44). Specifically, the Appeals Committee cautioned that "a person['s] assertion of innocence[,] however vigorous[,] against charges of a violation should not ordinarily be the subject of an unethical conduct finding." (*Compl.*, ¶ 44).

While admitting in writing on October 12, 2001, that a finding of ethical conduct constitutes a "stain on the reputation and career" of the violator, the NCAA failed to remove Plaintiff's ethical violation from its records, including its website. (*Compl.*, ¶¶ 42, 45, 46). In addition, the ethical charges remain part of Plaintiff's permanent personnel file maintained by SUNY Buffalo. (*Compl.*, ¶ 42). As such, the NCAA's stigmatizing report continues to be disclosed to all of Plaintiff's prospective employers. (*Compl.*, ¶ 42).

B. Procedural Background

Plaintiff commenced this case by filing a Complaint in the United States District Court for the Western District of New York on March 19, 2004. On October 4, 2004, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1] On March 4, 2005, this case was reassigned from Senior United States District Judge John T. Curtin to the undersigned.

In support of their motion, Defendants filed a Memorandum of Law and a Reply Memorandum of Law. Plaintiff filed a Memorandum of Law, an Affidavit, and a Sur-reply Memorandum of Law in opposition to the Motion.

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[1] According to the official docket in this case, Defendants erroneously filed a Memorandum of Law as a Motion to Dismiss on October 1, 2004. Defendants filed a proper Motion to Dismiss, along with the previously filed Memorandum of Law on October 4, 2004. As such, there is only one dispositive motion pending before this Court. The Clerk of the Court is directed to terminate the erroneously identified Motion to Dismiss (Docket No. 14), as it is duplicative of a document attached to the properly filed Motion (Docket No. 15).

III. DISCUSSION

A. Motion to Dismiss Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When resolving a motion to dismiss under Rule 12(b)(6), a court must accept the factual allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-moving party. *Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir.1996); *see also Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir.2000) (noting that factual allegations in the complaint must be accepted as true on a motion to dismiss). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir.1994) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

In order to survive a motion to dismiss, a plaintiff must assert a cognizable claim and allege facts that, if true, would support such a claim. *See Boddie v. Schnieder*, 105 F.3d 857, 860 (2d Cir.1997). At the same time, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to survive a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir.2002) (internal citations omitted). Ultimately, in the context of such a motion, "[t]he issue is not whether a plaintiff will or might ultimately prevail on her claim, but whether she is entitled to offer evidence in support of the allegations in the complaint." *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 62 (2d Cir.1997) (citation omitted).

B. Defendants' Motion to Dismiss

Plaintiff asserts two causes of action against Defendants. In the first cause of action, brought pursuant to 42 U.S.C. § 1983, Plaintiff alleges that Defendants violated his

constitutional right to due process. In Plaintiff's second cause of action, he claims that Defendants tortiously interfered with his contractual relationship with SUNY.

Defendants argue that both causes of action should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Specifically, Defendants contend that they are not state actors subject to liability under 42 U.S.C. § 1983. Second, Defendants argue that both of Plaintiff's claims are barred by the applicable statute of limitations. Finally, Defendants propose that should this Court find that Plaintiff's common law tortious interference claim is timely, it should nonetheless decline to exercise supplemental jurisdiction over this state law claim. This Court will address each cause of action in turn.

1. 42 U.S.C. § 1983: State Action Requirement

Civil liability is imposed under 42 U.S.C. § 1983 only upon persons who, acting under color of state law, deprive an individual of rights, privileges, or immunities secured by the Constitution and laws. *See* 42 U.S.C. § 1983; *Wimmer v. Suffolk County Police Dep't*, 176 F.3d 125, 137 (2d Cir.1999). On its own, Section 1983 does not provide a source of substantive rights, but rather, provides a method for vindicating federal rights conferred elsewhere in the federal statutes and the Constitution. *See Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 145 n. 3, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979)). Accordingly, in reviewing claims brought pursuant to Section 1983, it is necessary to precisely identify the constitutional violations alleged. *See Baker*, 443 U.S. at 140. Here, Plaintiff's claim is that Defendants violated his Fourteenth Amendment right to due process.

The Fourteenth Amendment provides, in pertinent part, that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST.

amend. XIV. There are two broad categories of due process claims—substantive and procedural. A substantive due process claim is based upon the deprivation of a constitutionally protected life, liberty, or property interest. *See B.D. v. DeBuono*, 130 F.Supp.2d 401, 431 (S.D.N.Y.2000). A procedural due process violation occurs when the Government deprives a person of a protected life, liberty, or property interest without first providing that person with notice and an opportunity to be heard. *Id.* at 432-33.

The fundamental purpose of Section 1983 is "to provide compensatory relief to those deprived of their federal rights by state actors." *Kia P. v. McIntyre*, 235 F.3d 749, 755 (2d Cir.2000) (quoting Felder v. Casey, 487 U.S. 131, 141, 108 S.Ct. 2302, 2308, 101 L.Ed.2d 123 (1988)). Accordingly, a court assessing the viability of a Section 1983 claim must first determine whether the actions alleged were committed under color of state law. *Carlos v. Santos*, 123 F.3d 61, 65 (2d Cir.1997). "The traditional definition of acting under color of state law requires that the defendant in a [Section] 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Kern v. City of Rochester*, 93 F.3d 38, 43 (2d Cir.1996) (quoting *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988)).

With respect to the Fourteenth Amendment, there exists a clear dichotomy between state action, which is subject to scrutiny under the due process clause, and "private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *NCAA v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988) (citing *Shelly v. Kramer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 11961 (1948); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 452, 42 L.Ed.2d 447 (1974)). As a general matter, the protections provided

by the Fourteenth Amendment do not extend to private conduct which abridges constitutional rights. *Tarkanian*, 488 U.S. at 191 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961)). Accordingly, for the purposes of this Court's analysis, the "under-color-of-law requirement of 42 U.S.C. § 1983 and the state-action requirement of the Fourteenth Amendment are equivalent." *Tarkanian*, 488 U.S. at 182 n. 4 (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 928-935, 102 S.Ct. 2744, 2749-2752, 73 L.Ed.2d 482 (1982)).

It is only under rare circumstances that a private entity may be considered a "state actor" for purposes of Section 1983. *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir.1992). Private action is considered "state action" if and only if, there is such a "close nexus between the State and the challenged action that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S.Ct. 924, 930, 148 L.Ed.2d 807 (2001) (quoting *Jackson*, 419 U.S. at 351). "From the range of circumstances that could point toward the State behind an individual face," however, "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Brentwood Acad.*, 531 U.S. at 295-96.

Numerous Supreme Court cases have identified the "host of facts that can bear on the fairness of such an attribution." *Brentwood Acad.*, 531 U.S. at 296. For example, when the challenged activity results from the State's exercise of "coercive power," *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982), or when a nominally private entity is "entwined with governmental policies," or when government is "entwined in [its] management or control," *Evans v. Newton*, 382 U.S.

296, 299, 301, 86 S.Ct. 486, 489, 15 L.Ed.2d 373 (1966), state action may be found.

In this context, the Supreme Court has explicitly held that the NCAA is not a state actor within the meaning of Section 1983. *Tarkanian*, 488 U.S. at 199. *Tarkanian* arose when the NCAA's Committee on Infractions investigated the allegedly improper recruiting practices of the University of Nevada, Las Vegas ("UNLV"), and discovered several violations committed by Jerry Tarkanian, UNLV's enormously successful basketball coach. *Tarkanian*, 488 U.S. at 179. Following the investigation, the Committee imposed numerous sanctions upon UNLV, and "requested it to show cause why the additional penalties should not be imposed if it failed to suspend Tarkanian during [the] probationary period." *Tarkanian*, 488 U.S. at 179. Faced with a potential demotion and drastic pay cut, Tarkanian brought suit against the NCAA alleging that it had deprived him of his due process rights in violation of 42 U.S.C. § 1983. *Tarkanian*, 488 U.S. at 179.

The Supreme Court held that "the NCAA's participation in the events that led to Tarkanian's suspension did not constitute 'state action' prohibited by the Fourteenth Amendment and was not performed 'under color of' state law within the meaning of [Section] 1983." *Tarkanian*, 488 U.S. at 179. Further, the Court held that the NCAA could not be "deemed to be a state actor on the theory that it misused power it possessed by virtue of state law, since UNLV's decision to suspend Tarkanian, while in compliance with the NCAA's rules and recommendations, did not turn the NCAA's conduct into action under color of [State] law." *Tarkanian*, 488 U.S. at 179. The Court opined that "it would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of [State] law." *Tarkanian*, 488 U.S. at 199.

In holding the NCAA's investigation, enforcement proceedings, and consequent recommendations did not constitute state action, the Court reasoned that "UNLV delegated no power to the NCAA to take specific action against any University employee; UNLV and the NCAA acted as adversaries throughout the proceedings; the NCAA enjoyed no governmental powers to facilitate its investigation; and the NCAA did not—indeed, could not—directly discipline Tarkanian, but could only threaten additional sanctions against UNLV if the University chose not to suspend its coach." *Tarkanian*, 488 U.S. at 180. Furthermore, the Court reasoned, even assuming that "the power of the NCAA [was] so great that [the University] had no practical alternative but to comply with the Association's demands, it did not follow that the NCAA was therefore acting under color of state law." *Tarkanian*, 488 U.S. at 180.

Tarkanian compels the same conclusion in the instant case. That is, this Court finds that the NCAA, including its employees, did not engage in state action by investigating Plaintiff regarding his alleged infractions, however unfairly, by publishing a report concluding that he was guilty of such infractions, or by recommending that SUNY force him to resign. This Court is not persuaded by Plaintiff's argument that SUNY's cooperation, complicity, or conspiracy with the NCAA transformed its otherwise private conduct into state action.[2] As the Supreme Court articulated in Tarkanian,

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[2] In support of his argument, Plaintiff cites to *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). Unlike the case at bar, *Brentwood* involved an athletic association that regulated interscholastic sports among the private and public schools *in a single state*, Tennessee. The Court found under the circumstances in *Brentwood* that the athletic association's nominally private character was "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings," leading to a conclusion of state action. *Brentwood*, 531 U.S. 289. The *Brentwood* Court took pains to distinguish *Tarkanian*, stating that in the previous case "the NCAA's policies were shaped not by

"[j]ust as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict with the State ... the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university." 488 U.S. at 196 (internal citations omitted); *see also McRae v. Sweet*, No. 91-CV-1403, 1991 WL 274261, at *4 (N.D.N.Y. Dec.17, 1991) ("[T]he independent nature of the NCAA was finally decided by the Supreme Court in 1988, in Tarkanian."). Consistent with this characterization, this Court finds that the NCAA conducted its investigation of SUNY Buffalo, a public university, and its coach, in the interests of the entire NCAA membership. *See Tarkanian*, 488 U.S. at 193.

Under the circumstances, it cannot be said that SUNY Buffalo's alleged complicity in this investigation somehow transforms the NCAA's well-establish private conduct into state action for purposes of Section 1983. Assuming the

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the University of Nevada alone, but by several hundred member institutions, most of them having no connection to Nevada, and exhibiting no color of Nevada law." *Brentwood*, 531 U.S. 289. Unlike the athletic association in *Brentwood*, the NCAA promulgates and enforces its rules and otherwise acts on behalf of its collective nationwide membership, "speaking through an organization that is independent of any particular state." *Tarkanian*, 488 U.S. at 193. Accordingly, the NCAA cannot be characterized as a nominally private actor that is so pervasively intertwined with any state such that it is subject to liability under 42 U.S.C. § 1983.

Plaintiff also cites to *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), for the proposition that where state and private actors engage in joint activity, as SUNY Buffalo and the NCAA did here, the private actor's conduct may be construed as state action. However, *Lugar* is "explicitly limited to the particular context of prejudgment attachment." *Wilson v. Pfieffer*, 565 F.Supp. 115, 118 (S.D.N.Y.1983). Nor do the other cases cited by Plaintiff, *Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308 (2d Cir.2003) and *Lloyd v. Botanical Gardens*, No. 03 7557, 2004 WL 2093468, at *5 (S.D.N.Y. Sept.17, 2004), compel the conclusion that the NCAA's conduct constituted state action here.

truth of Plaintiff's allegations, as it must, this Court finds that the NCAA's actions cannot reasonably be attributable to New York State such that liability may be imposed upon it under 42 U.S.C. § 1983. Accordingly, Plaintiff's due process claim brought pursuant to Section 1983 will be dismissed.

2. State Claim for Tortious Interference with Contractual Relations: Statute of Limitations

To prevail on a claim for tortious interference with a contract, a plaintiff must establish: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff. *Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir.1996) (citing *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956)). Under New York law, such claims are governed by the three year statute of limitations applicable to injury to property. *See* N.Y. C.P.L.R. § 214(4); *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 92, 595 N.Y.S.2d 931, 612 N.E.2d 289 (1993). The statute of limitations on a tortious interference claim accrues "when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." *Kronos*, 81 N.Y.2d at 94, 595 N.Y.S.2d 931, 612 N.E.2d 289.

In the instant case, Plaintiff alleges that two contracts existed between himself and SUNY Buffalo: his employment contract, which SUNY extended until April 13, 2002; and the contract executed on the day of his resignation, December 3, 1999, which contained a release for any of Plaintiff's actions that occurred prior to that date. (*Compl.*, ¶¶ 59, 64). Plaintiff claims that the NCAA had actual knowledge of both of these contracts. (*Compl.*, ¶¶ 62, 65). Nonetheless, Plaintiff alleges, the NCAA induced

SUNY to breach its employment contract with him by forcing his resignation on December 3, 1999. (*Compl.*, ¶ 63). Further, he contends that the NCAA caused SUNY to breach its contract of release by engaging the University in a "continuous pattern of wrongful, improper or egregious conduct" against Plaintiff, which took place between December 4, 1999, and March 21, 2001. (*Compl.*, ¶¶ 66, 67). As previously noted herein, Plaintiff filed his Complaint on March 19, 2004.

Based on the foregoing, this Court finds that Plaintiff's tortious interference claim is barred by the applicable statute of limitations. With respect to Plaintiff's employment contract, any tortious interference claim based on breach of contract clearly accrued on December 3, 1999, the date he was forced to retire, and expired three years later, on December 4, 2003, several months before he filed his Complaint on March 19, 2004. Likewise, this Court finds that any such claim based on SUNY's contract to release Plaintiff for actions he committed prior to his resignation on December 3, 1999, accrued between January 16, 2000, and January 18, 2000, when SUNY participated in the case against Plaintiff at a hearing conducted by the Committee on Infractions. Put another way, all of the facts necessary to a cause of action sounding in tortious interference with this contract existed no later than January 2000, and Plaintiff could have sought relief at that juncture. *See Spinap Corp. Inc. v. Cafagno*, 302 A.D.2d 588, 588, 756 N.Y.S.2d 86 (2d Dep't 2003) (citing *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541, 620 N.Y.S.2d 318, 644 N.E.2d 1009 (1994)). His failure to file suit until March 19, 2004, renders his claim untimely.

This Court is not persuaded by Plaintiff's argument that his claim is timely based on a continuing violation theory. Under New York law, tortious interference with a contract is not a continuing tort for statute of limitations purposes. *Spinap Corp.*, 302 A.D.2d at 588, 756 N.Y.S.2d 86 (citing

Bloomfield Bldg. Wreckers, Inc. v. City of Troy, 41 N.Y.2d 1102, 1103, 396 N.Y.S.2d 359, 364 N.E.2d 1130 (1977)). As such, Plaintiff's claim, filed more than three years after the events which gave rise to it, is barred by the statute of limitations. Thus, Plaintiff's remaining state law claim for tortious interference with contractual relations will be dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is granted. Specifically, Plaintiff's federal claim is dismissed because Defendants are not state actors subject to liability under 42 U.S.C. § 1983. Further, Plaintiff's state law claim based on tortious interference with contractual relations is dismissed because it is barred by the applicable statute of limitations.

V. ORDERS

IT HEREBY IS ORDERED that Defendants' Motion to Dismiss (Docket No. 15) is GRANTED.

FURTHER, the Clerk of Court is directed to terminate Defendants'[1] erroneously identified Motion to Dismiss (Docket No. 14), as duplicative of the Memorandum of Law appearing at Docket Number 15.

FURTHER, that the Clerk of the Court shall take the steps necessary to close this case.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
Acting Clerk

Date:	
Docket Number:	05-5860-cv
Short Title:	Cohane v. National Collegiate Athletic Association
DC Docket Number:	04-cv-181
DC:	WDNY (BUFFALO)
DC Judge:	Honorable William Skretny

UNITED STATES COURT
OF APPEALS

FILED
MAR 29 2007
Thomas Asreen, Acting Clerk

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of March two thousand seven.

Timothy M. Cohane,

Plaintiff-Appellant,

v.

National Collegiate Athletic Association, by and through its President, Myles Brand; Tom Hosty, as an NCAA Enforcement Director and as an employee of the NCAA; Stephanie Hanna, as an NCAA Enforcement Director and as an employee of the NCAA; Jack Friedenthal, as an employee of the NCAA; and Former Chairman of the NCAA Committee on Infractions,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Appellee National Collegiate Athletic Association, Appellee Tom Hosty, Appellee Stephanie Hanna, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
Thomas Asreen, Acting Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TIMOTHY M. COHANE,

Plaintiff,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; by and through its President, Myles Brand,

TOM HOSTY, as an NCAA Enforcement Director and an employee of the NCAA,

STEPHANIE HANNA, as an NCAA Enforcement Director and an employee of the NCAA,

JACK FRIEDENTRAL, as an employee of the NCAA, and former Chairman of the NCAA Committee on Infractions,

Defendants

Civ No.04-CV-0181 c/sr

COMPLAINT AND JURY DEMAND

[seal illegible]

MAR 19 2004

BY: /s/ D. Schmidt

1. Plaintiff, Timothy M. Cohane, by his attorneys, O'Leary & O'Leary, for his Complaint against the defendant above-named, alleges as follows:

JURISDICTION AND VENUE

2. This is a civil action brought for injunctive relief and for money damages to redress the injuries the defendants have caused to plaintiff by the deprivation under color of state law of the right to due process secured to plaintiff.

(a) The claims contained in this action arise under the provisions of the Fourteenth Amendment of the United States Constitution; and

(b) The Civil Rights Act of 1871, codified as 42 U.S.C. §§1983,

3. Jurisdiction over the federal claims is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343; supplemental jurisdiction over the related state laws claims is attained pursuant to 28 U.S.C. § 1367(1).

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2).

PARTIES

A. The Plaintiff

5. Plaintiff, Timothy M. Cohane, ("Cohane"), served as head coach of the men's intercollegiate NCAA Division I basketball team at The State University of New York at Buffalo ("SUNY Buffalo") from 1993 through December 3, 1999. During this time Mr. Cohane's employment was pursuant to written contract, he was a member of the faculty staff and terms of his employment were covered under a collective bargaining agreement existing between the State of New York and the Public Employees Union.

B. The Defendants

6. The defendant, National Collegiate Athletic Association ("NCAA") is an unincorporated association. Further, the NCAA markets, rules, governs, controls,

operates and licenses the multi billion dollar college sports industry and is sued herein by and through its president, Myles Brand ("Brand").

7. At all times mentioned herein, the defendant, NCAA is an unincorporated association which is involved in interstate Commerce including the transaction and engagement of business and commerce in the State of New York.

8. At all times herein mentioned, the defendant, NCAA by association, contract, agreement, and action through its agents, servants and or employees did and still does jointly engage in, control and operate all aspects of intercollegiate sports programs and athletic departments operating at a New York State funded institution known as State University of New York at Buffalo ("SUNY Buffalo") including the men's basketball team.

9. At all times relative to this complaint as alleged below in Count I, the defendant NCAA acted as an agent of the State of New York and by reason of the NCAA's willful participation and joint action actions as taken with state officials is sued herein in its capacity as a state actor, acting under color of state law.

10. Upon information and belief the defendants, Tom Hosty ("Hosty") and Stephanie Hanna ("Hanna") are employees of the NCAA and acted in a capacity as director of the NCAA enforcement staff.

11. Upon information and belief, defendant Jack Friedenthal ("Friedenthal") was an agent/servant and/or is an employee and member of the NCAA and acted in a capacity as Chairman of the Committee on Infractions on behalf of the NCAA.

12. At all times herein mentioned, the defendant NCAA had an agreement with the State of New York pursuant to which the NCAA which transacts business within the State

of New York and engages in business with the State of New York.

13. At all times hereinafter mentioned, defendant NCAA and SUNY Buffalo jointly engaged in the regulation and management of the men's basketball program at SUNY Buffalo; further SUNY Buffalo delegated significant controlling authority over its, basketball program to defendant NCAA.

14. Relief is sought against each and all defendants. The defendant NCAA is also sued herein by reason of tortious and wrongful actions committed in the State of New York by its agents servants and or employees.

15. This action is brought against the separate defendants, NCAA, HOSTY, HANNA and the NCAA both jointly and severally, and in their official and individual capacities.

16. The named defendants herein at all times relative to the complaint acted under the authority and laws of the State of New York. By reason of defendants' actions as set forth in Count I below, plaintiff has been deprived of rights protected by the United States Constitution and federal statutory law, as well as rights protected by common law. All references to "defendants" hereinafter shall mean all named defendants individually and in their official capacity.

BACKGROUND

17. Mr. Cohane was a student-athlete at the U.S. Naval Academy where he played varsity basketball. He graduated from the Naval Academy in 1967 and then was commissioned as an ensign in the Navy.

18. In 1968, Mr. Cohane volunteered for an assignment to command river boats during the Vietnam War. He fought in Vietnam during 1968 and 1969.

19. Plaintiff Cohane then returned home to the United States as a decorated war veteran. He received a Purple

Heart and two Bronze Star Medals from the President of the United States. Upon returning from war, Mr. Cohane was assigned to the United States Naval Base in Newport, Rhode Island. For two years he coached the basketball team at the base.

20. Mr. Cohane left the Navy in 1971 to accept a job at Iona Prep in New York. There, Mr. Cohane taught history and coached basketball for four years on the secondary school level.

21. In 1974, he began his career as a college basketball coach at Manhattanville College.

22. After five years at Manhattanville, Mr. Cohane left to accept the head men's basketball coaching position at Dartmouth College.

23. After coaching at Dartmouth for a period of four years, Mr. Cohane pursued a career on Wall Street. Mr. Cohane was successful in business, but missed coaching student athletes. Therefore, in 1988, he accepted a position as the unsalaried head coach at the United States Merchant Marine Academy.

24. From 1990-1991, Mr. Cohane worked as a voluntary assistant men's basketball coach at the United States Military Academy. After one season at West Point, Mr. Cohane left the Academy to take a similar position at Boston College, where he coached from 1991-1993.

FACTS

25. In 1993, SUNY Buffalo hired Mr. Cohane as its head men's basketball coach. During the first five seasons that Mr. Cohane coached, Nelson E. Townsend was the Director of Athletics at SUNY Buffalo. In the first five seasons under coach Cohane, the SUNY Buffalo men's basketball program progressed from an NCAA team without a league to the East Coast Conference, the Mid American

Conference and finally the MAC. In short, Coach Cohane's performance was extraordinary.

26. On January 29, 1999 SUNY Buffalo approved plaintiff's contract extension effective through April 13, 2002.

27. On August 9, 1999 Rob Fournier ("Fournier"), a Mid American Conference employee, authored and signed a letter addressed to the NCAA wherein Fournier confirmed a phone call he made to the NCAA on August 3, 1999 concerning an alleged infraction. Fournier in the August 9, 1999 letter referred to "documentation offered by the school". Further, the August 9, 1999 Fournier letter stated as follows:

> "As a consequence of the sensitive personal and private issues to be protected, the Conference will undertake this process in the coming weeks by submitting affidavits, interviewing affected parties, and insuring due process .... Toward that end, we will utilize when necessary the full services and cooperation of personnel at the University at Buffalo including New York State legal counsel."

28. Upon information and belief, on December 3, 1999, a meeting was held during which plaintiff was told by SUNY Buffalo counsel that the NCAA advised SUNY that it was assumed plaintiff was guilty of major NCAA rule violations and plaintiff and his staff should be forced to resign. On December 3, 1999, plaintiff was forced to resign.

29. On December 7, 1999, plaintiff receive a notification which that "Mid American Conference has adopted both conference procedures and in absence of specific stipulations those of NCAA Articles By-law 32".

30. On December 22, 1999 Fournier, representing the MAC and the NCAA, wrote to school officials that "although

characterized as a resignation (of Cohane) it has the effect of the change of leadership...and are all detailed as an institutional response to this investigation".

31. Between January 16, 2000 and January 18, 2000, the MAC Committee on Infractions held a hearing. Representatives of the MAC schools judged and reported on the MAC investigation and report of Fournier. Also present and participating presentation in the case against Cohane were SUNY Buffalo school officials and representatives of the NCAA.

32. At the hearing plaintiff's right to due process was violated by reason of the willful, arbitrary and capricious actions of the defendants.

33. At the hearing the plaintiff's rights to due process was violated by willful arbitrary and capricious actions including the suborning of perjury.

34. Between January 18, 2000 and October 14, 2001 the defendant NCAA arbitrarily and capriciously violated and disregarded their own rules, regulations, by-laws and procedures, including but not limited to Article 32 of NCAA By-laws as set forth and pertaining to:

> Conformance with procedures; Conflict of Interest; Status Notification, Public Announcements;
>
> Confidentiality; Representation by Legal Counsel; Proper Identification by Staff Member; Disclosure of Purpose of Interview; Basic Information Gathering; Timely Process; Recording of Interview Proceedings; Verification and Access to Records; Corroboration or Refutation of Information; Disclosure of Information; Notification of Others in Potential Jeopardy Obligation to Provide Full Information.

35. In the Spring of 2000, after the basketball season completed and after some student-athletes had exhausted their NCAA eligibility, the NCAA enforcement staff requested interviews with student-athletes regarding plaintiff. Student-athletes told State officials at SUNY Buffalo that they would not interview with the NCAA enforcement staff. In response, school officials under the control of the NCAA and aiding NCAA misled and improperly advised student-athletes that if they did not comply with the NCAA request for an interview the issuance of their degrees could be at risk.

36. On January 29, 2001 defendant employees Hosty and Hanna, issued a case summary to be used by the NCAA Committee of Infractions in a hearing to be held on February 9, 2001. In the preparation of the case study the defendant used and relied upon information provided by SUNY Buffalo officials including affidavits the defendants knew were coerced, false and otherwise tainted. Furthermore, in numerous instances Hosty and Hanna willfully and recklessly changed testimony in order to implicate plaintiff in alleged rules violations at SUNY Buffalo.

37. That on February 9, 2001, Cohane appeared before the NCAA for a so-called hearing. During the hearing, defendant NCAA and its employees defendants Hosty, Hanna and Friedenthal actively and jointly participated with SUNY Buffalo officials and MAC officials to violate and obstruct plaintiff's rights of due process. The defendants acting together with state university officials knowingly and carelessly permitted tainted and false sworn affidavits to be presented and used as evidence against Cohane.

38. That defendant NCAA and its employee Friedenthal, carrying a badge of authority bestowed by the State of University at Buffalo, publicly and voluntarily stated and declared in a written report/press/internet/

release titled "**University at Buffalo, The State University of New York Public Infractions Report**" dated March 21, 2001 that plaintiff acted "contrary to the principles of ethical conduct". The NCAA report further declared that plaintiff was "evasive, deceptive and not credible". In addition, sanctions were imposed to keep plaintiff from being able to coach in any NCAA school which includes schools in the New York State's Public University System.

39. In an unprecedented act of maliciousness, and in retaliation against Mr. Cohane's attempts to defend himself and establish his innocence, the NCAA in the March 21, 2001 report also found plaintiff guilty of major violations. In over 300 cases before and since involving the same by law before or since the NCAA uniformly ruled them to be minor violations.

40. In a further act of retaliation the NCAA charged Mr. Cohane with violating By-law 10.1, Ethical Conduct without cause.

41. On March 21, 2001 following the release of the NCAA report, a joint press conference was held before the media by the NCAA and SUNY Buffalo in which State University officials publicly declared that "UB accepts the report and its findings in its entirety". Plaintiff requested, but was denied, participation in the joint press conference.

42. That the untrue and false stigmatizing charges made by the defendants are for all time part of the plaintiff's personnel file maintained by the State University of New York at Buffalo and NCAA files including the NCAA website. The NCAA mandated that plaintiff was guilty of "violating principles of ethical conduct" and that plaintiff was "evasive, deceptive and not credible". This NCAA declaration and its ratification by SUNY Buffalo officials has been and continues to be disclosed by the defendants and State University officials to all prospective future

employers of plaintiff during plaintiff's attempts to seek future employment as a head coach in college basketball.

43. On August 20, 2001 the NCAA Appeals Committee reviewed the finding of the March 21, 2001 report.

44. On October 12, 2001 the NCAA Appeals Committee reprimanded the Committee on Infractions and stated that "many aspects of the case were troublesome". The Committee on Infractions was reprimanded for: not interviewing key witnesses; inconsistent investigation; using certain troublesome language involving the ethical conduct violation; the rationale for the ethical conduct finding. The Appeals Committee stated: "it is important to state clearly that a persons assertion of innocence however vigorous against charges of violations should not ordinarily be the subject of an unethical conduct finding".

45. The NCAA on October 12, 2001 admitted in writing that a finding of a violation of ethical conduct constitutes a "stain on the reputation and career" of the alleged violator.

46. Despite the NCAA admission that the ethical conduct charge was made in error and amounts to a scarlet letter, neither the NCAA or SUNY Buffalo took any action to remove this finding from the plaintiff's employment and/or NCAA record.

CLAIMS

Count I

47. Plaintiff incorporates by reference paragraphs "1" through "46" of this Complaint as if herein set forth at length.

48. That from August 1999 up to and including October 2001 the defendants, Hosty, Hanna and the NCAA acted under color of state law and were jointly engaged with State officials employed at SUNY Buffalo, including former athletic director Robert Arkeilpane, interim athletic director Bill Maher, Dennis Black, Vice president for

Student Affairs and former University President, William R. Greiner, all of whom willfully and jointly participated to and did engage in a wrongful pattern of wrongful conduct and actions which violated plaintiff's rights as guaranteed by the Fourteenth Amendment to the United States Constitution and in violation of plaintiff's civil rights as provided by 42 U.S.C. § 1983.

49. At all times herein, the NCAA sufficiently involved with SUNY Buffalo that NCAA conduct constituted state action. SUNY Buffalo: created the legal framework governing the conduct; delegated its state authority to the NCAA and knowingly accepted the benefits derived from the NCAA's unconstitutional behavior.

50. At all times the NCAA and SUNY Buffalo worked in close nexus to accomplish the wrongful actions complained of herein. The NCAA acted together with and obtained significant aid from State officials. The NCAA was a willful participant in state activity and worked in concert with SUNY Buffalo. The school officials authorized and the NCAA and were united against plaintiff.

51. That the defendants by their conduct, statements and actions, deprived plaintiff of the liberty interest of his reputation without due process law as provided in the Fourteenth Amendment of the United States Constitution and in violation of 42 U.S.C. § 1983.

52. The defendants through March 21, 2001 and continuing, voluntarily, publicly and falsely accuse plaintiff of misconduct and stigmatized him by declaring plaintiff guilty of "violating principles of ethical conduct" and other serious charges in the course of his employment at the SUNY Buffalo in violation of plaintiff's civil rights as guaranteed by the Fourteenth Amendments to the United States Constitution and in violation of plaintiff's civil rights as provided by 42 U.S.C. § 1983.

53. That the defendants herein by their wrongful conduct, statements, actions and omissions deprived the plaintiff of his property interest as a state employee without due process.

54. That the defendants by their wrongful conduct and statements struck to the very heart of plaintiff's professional competence and drastically impaired plaintiff's chance of ever receiving a head coaching position. The defendants have impugned plaintiff's reputation in such fashion as to effectively put a roadblock in the plaintiff's continued ability to practice his profession and deprived plaintiff of the freedom to continue employment in the coaching field.

55. That as a result of the actions of the defendants herein, plaintiff has suffered economic loss, damage to reputation and emotional distress.

56. That the actions of the defendants were undertaken wilfully, intentionally and maliciously, or with reckless disregard for the rights of the plaintiff thereby entitling plaintiff to punitive damages.

Count II

(Tortious interference with contractual relations against defendants MAC and Fournier)

57. Plaintiff incorporates by reference paragraphs 1 though 46 as set forth herein.

58. That a valid written contract of employment existed between the SUNY Buffalo and the plaintiff Cohane.

59. That said contract provided that Coach Cohane was deemed a state employee contracted to coach the Men's basketball team at SUNY Buffalo through April 13, 2002.

60. That the terms of the plaintiff's employment contract was covered by the collective bargaining agreement between the State of New York and the Public Employees Union.

61. The State University of New York adopted NCAA regulations and incorporated the regulations into the plaintiff's employment contract thereby creating a State adopted policy and guidelines which included NCAA regulations.

62. That upon information and belief, the defendant NCAA had actual knowledge of the written employment contract including terms and addendums thereto which existed between plaintiff and the State University of New York.

63. That by reason of the defendants actions as alleged in the complaint herein defendant procured a breach of plaintiff's employment contract to be caused by the State University of New York.

64. That December 3, 1999 plaintiff entered into a second written contract with SUNY Buffalo. The terms of the contract included a release for actions by the plaintiff which may have allegedly occurred on or prior to December 3, 1999.

65. That the defendant NCAA had actual knowledge of said contract dated December 3, 1999 including the terms and conditions thereof.

66. That the State University of New York on December 4, 1999 through March 21, 2001 and continuing has materially breached the December 3, 1999 contract by engaging in continuous pattern of wrongful, improper and egregious conduct and statements as alleged and which constituted a breach of the December 3, 1999 contract.

67. That the defendant NCAA jointly and severally by its conduct and actions as alleged in the Complaint herein procured and did cause the State of New York to breach the aforesaid December 3, 1999 contract between plaintiff and the State University of New York

68. As a result of defendant NCAA's actions, the State University of New York at Buffalo engaged in a continuous and wrongful pattern of conduct from December 4, 1999 through March 21, 2001 and continuing. During this time period the State University of New York, through its employees agents and officials, publicly claimed and alleged through false and misleading statements and documents that were submitted by the State University of New York at Buffalo that plaintiff had engaged in conduct that violated NCAA regulations by actions which occurred prior to December 3, 1999. This conduct constitutes a breach of the contract between SUNY Buffalo and the plaintiff.

69. That as a result of the defendant NCAA's tortious interference with the contractual relationship between plaintiff and the State University of New York at Buffalo, the plaintiff was caused to suffer economic damages, loss of income, and emotional distress.

RELIEF REQUESTED

WHEREFORE, plaintiff respectfully demands judgment against defendants:

(1) Declaring that plaintiff is entitled to name clearing hearing to seek removal of the false charges and a declaration that the defendants violated plaintiff's rights to due process;

(2) Granting plaintiff compensatory and punitive damages against defendants NCAA, arising from defendants aforesaid unlawful actions, as alleged in Count I, together with lawful pre-judgment interest thereon in the amount of $15,000,000.00;

(3) Awarding plaintiff compensatory and punitive damages and as against defendant NCAA, arising from their tortious actions as alleged in Count II in the amount of $10,000,000,00;

(4) Awarding plaintiff his reasonable attorneys fees pursuant to 42 U.S.C. § 1988;

(5) Awarding plaintiff the costs and disbursements of this action; and

(6) Awarding plaintiff such other and further relief as the Court seems just and proper.

JURY DEMAND

The plaintiff hereby demands, under Rule 38(b) of the Federal Rules of Civil Procedure, a trial by jury of all issues triable of right by a jury.

Dated: Garden City, NY
March 18, 2004

/s/ Sean O'Leary
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No. 07-107

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.,
Petitioners,

v.

TIMOTHY M. COHANE.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

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October 12, 2007

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QUESTION PRESENTED

Should this Court grant review of the unpublished summary order in which the Second Circuit concluded that the district court erred in holding that the National Collegiate Athletic Association was categorically exempt from liability under 42 U.S.C. § 1983 and remanded respondent's case to the district court for further proceedings?

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STATEMENT OF THE CASE

Petitioners NCAA et al. (collectively, "NCAA") seek review of a non-precedential, summary order that does nothing more than state that the NCAA's status as a private association does not render it categorically exempt from liability under 42 U.S.C. § 1983 and on that basis remands the case to the district court for further proceedings.

1. As this case arrives on petitioners' motion to dismiss, the relevant facts are taken from respondent's complaint and assumed to be true. *See Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). According to the complaint, from 1993 to 1999, respondent Timothy M. Cohane served as the head basketball coach of the State University of New York at Buffalo ("SUNY" or "SUNY Buffalo"). Pet. App. 24a. In January 1999, SUNY Buffalo – recognizing respondent's extraordinary performance as a coach – extended his contract for an additional three years, through April 13, 2002. *Id.* 28a. Previously, respondent spent over two decades coaching basketball, including fourteen years as a college coach. *Id.* 27a. Throughout that time, respondent was never accused of committing even minor violations of NCAA rules. Resp. C.A. Br. 5.[1]

Petitioner National Collegiate Athletic Association ("NCAA") is an unincorporated association that markets, rules, governs, controls, operates, and licenses the college sports industry. Pet. App. 24a-25a. In particular, at all times relevant to respondent's complaint, the NCAA regulated the sports program and athletic department at SUNY Buffalo. *Id.* 25a.

In August 1999, respondent was accused of violating NCAA rules through his presence in the basketball gym during

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[1] Respondent is a 1967 graduate of the United States Naval Academy. Pet. App. 26a. During 1968 and 1969, he served as a river boat commander in Vietnam. For his service, he was awarded a Purple Heart and two Bronze Stars. *Id.* 26a-27a.

the off-season – a so-called "secondary violation." *See* Pet. App. 28a; Resp. C.A. Br. 5.

On December 3, 1999, respondent was summoned to a meeting with SUNY Buffalo lawyers. Pet. App. 28a. At the meeting, respondent learned that the NCAA had advised SUNY Buffalo that it presumed respondent guilty of major NCAA rule violations and that SUNY should thus force him to resign. *Id.* Acting on the NCAA's recommendation, SUNY officials forced respondent to resign immediately, without any opportunity for a hearing. *Id.*

After respondent's resignation, the NCAA and SUNY officials continued to act jointly against his interests and contrary to NCAA bylaws. For example, officials from both the NCAA and SUNY Buffalo participated in presenting the case against respondent at a January 2000 hearing of the Mid American Conference, a subdivision of twelve NCAA teams in which SUNY Buffalo competes. Pet. App. 29a. At this hearing, respondent's due process rights were violated by "willful[,] arbitrary and capricious actions including the suborning of perjury." *Id.*

The NCAA also proceeded with its own investigation in concert with SUNY officials. In the spring of 2000, members of the NCAA's enforcement staff sought to interview SUNY Buffalo students whose eligibility to play collegiate sports had expired.[2] Pet. App. 30a. When some of the students initially refused to meet with the NCAA enforcement staff, SUNY officials threatened to withhold the students' degrees unless they complied with the NCAA investigators. *Id.*

---

[2] Under NCAA bylaws, the NCAA can strip a student athlete of his eligibility to compete if he "[r]efus[es] to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individual's institution." *See* Article 10, 2000-2001 NCAA Division I Manual, http://www.ncaa.org/library /membership/ division_i_manual/2000-01/article_10.pdf. However, once a student athlete's eligibility has expired, the NCAA would generally have little recourse to compel him to cooperate if he does not wish to do so.

Two members of the NCAA's enforcement staff, petitioners Hosty and Hanna, were fully aware that the university had provided the NCAA with testimony that was coerced, false, and otherwise tainted. Hosty and Hanna also changed testimony to support their case against respondent. Pet. App. 30a. Hosty and Hanna then used this tainted evidence to compile a case summary of the investigation, issued on January 29, 2001, to be used by the NCAA Committee on Infractions at a hearing regarding the investigation into the alleged violations. *Id.*

On February 9, 2001, respondent appeared at the hearing conducted by the Committee on Infractions. Both NCAA and SUNY officials participated in the hearing and jointly and knowingly presented the tainted and false evidence against respondent. Pet. App. 30a.

Based on the tainted evidence gathered by NCAA and SUNY employees and presented at the February hearing, on March 21, 2001, the NCAA published a final report – made available on the Internet – in which it condemned respondent's alleged conduct and his character. Pet. App. 30a-31a. Specifically, the final report deemed respondent to have been "evasive, deceptive and not credible," and it charged him with "violating principles of ethical conduct." *Id.* 31a. And contrary to prior cases in which similar conduct had been deemed a minor violation of NCAA rules, the report – in retaliation for respondent's efforts to defend himself – concluded that respondent was guilty of "major violations." *Id.* The NCAA also imposed sanctions that, when combined with the March 21, 2001, report, would effectively render it impossible for respondent to obtain a coaching position at another NCAA school. *Id.*

In conjunction with the release of the final report, NCAA and SUNY Buffalo officials held a joint press conference at which SUNY officials publicly declared that they "accept[ed] the report and its findings in its entirety." Pet. App. 31a.

Respondent appealed the report and its findings to the NCAA Appeals Committee, which agreed with respondent that "many aspects of the case were troublesome." Pet. App. 31a-32a. In particular, the Appeals Committee emphasized, an "assertion of innocence[,] however vigorous[,] against charges of violations should not ordinarily be the subject of an unethical conduct finding." *Id.* 32a. And although the Appeals Committee acknowledged that the investigation and subsequent report remain a "stain on [respondent's] reputation and career," neither the NCAA nor SUNY Buffalo removed the ethical conduct violation from its records. *Id.* The ethical conduct violation remains on respondent's employment and NCAA records, amounting to "a scarlet letter" that makes him unemployable as a college basketball coach. *Id.*

2. On March 19, 2004, respondent filed this suit, alleging that the NCAA's direct actions in joint participation with SUNY Buffalo deprived him of his liberty interest in his reputation without due process of law, in violation of 42 U.S.C. § 1983. *See* Pet. App. 10a. Section 1983 provides a private right of action for deprivations of constitutional rights by persons acting "under color of" state law. It is well-settled that the statute's provisions extend to private actors when their actions are "fairly attributable" to the state. As this Court has repeatedly made clear, whether an action is "fairly attributable" to the state depends on a host of fact-specific criteria. One such criterion is "when a private actor operates as a willful participant in joint activity with the State or its agents." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (internal quotation marks omitted) [hereinafter *Brentwood I*].

Petitioners filed a motion to dismiss respondent's complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the basis of this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179 (1988). In *Tarkanian*, this Court considered whether the NCAA could be held liable under § 1983 in former UNLV basketball coach Jerry Tarkanian's challenge to his suspension by a state

university. Tarkanian alleged that because the state university, in suspending him, had acted in compliance with NCAA rules and recommendations, the NCAA's conduct constituted "state action" for purposes of the statute. Based on the specific facts before it, the Court rejected Tarkanian's contention that the NCAA could be deemed a state actor under the joint participation theory. *Id.* at 196 n.16. In particular, the Court explained, Tarkanian's assertion was "belied by the history of the case," which indicated not only that the NCAA and UNLV had not cooperated in the investigation of Tarkanian, but indeed that the interests of the NCAA and UNLV were so "diametrically opposed" that the two actually acted as adverse parties. *Id.* at 196. And even to the extent that UNLV and the NCAA might have acted cooperatively, the Court found "no suggestion of any impropriety." *Id.* at 197 n.17.

Respondent's complaint differs materially from Tarkanian's allegations that UNLV's compliance with NCAA rules and regulations rendered the NCAA a state actor. Respondent alleges that the NCAA and SUNY Buffalo officials willfully participated in joint activity that culminated in the NCAA's release, and the university's ratification, of the March 21, 2001 report of its investigation. Pet. App. 28a-32a. The complaint provides detailed examples of such joint activity, including that SUNY Buffalo officials – at the NCAA's behest – coerced students into interviewing with NCAA officials by threatening to withhold their college degrees, *id.* 30a; NCAA enforcement officials knowingly prepared a case summary that relied on tainted evidence provided by university officials, *id.*; NCAA and SUNY Buffalo officials knowingly used tainted evidence when they jointly presented the case against respondent at the February 2001 hearing, *id.*; the NCAA issued the report condemning respondent's conduct entitled "University at Buffalo, The State University of New York Public Infractions Report," *id.* 30-31a; and both the NCAA and SUNY Buffalo officials appeared at a joint press conference regarding the report. *Id.* 31a. In light of

these allegations, the complaint concludes, the NCAA's conduct constituted state action such that the organization may be held liable for its role in unconstitutionally defaming respondent and precluding him from pursuing his career as a basketball coach. *Id.* 32a-34a.

Despite these many distinctions, petitioners argued to the district court that *Tarkanian* adopted a *categorical* rule that the NCAA is *never* a state actor. Pet. App. 12a. The court agreed. *Id.* 15a-18a. Opining that "the Supreme Court has explicitly held that the NCAA is not a state actor within the meaning of Section 1983," *id.* 15a, the district court held that "*Tarkanian* compels the same conclusion" in respondent's case, *id.* 16a.

3. On appeal, a panel of the Second Circuit rejected the district court's categorical holding in a non-precedential, summary order that remanded the case for further proceedings. Pet. App. 1a-5a. The court of appeals explained that this Court held in *Tarkanian*, based on the particular facts of that case, that the plaintiff could not sue the NCAA under § 1983 for the actions involved in that case. *Id.* 4a. Accordingly, "it was error for the District Court to interpret *Tarkanian* as holding categorically that the NCAA can never be a state actor when it conducts an investigation of a state school." *Id.* 5a. Petitioner moreover was entitled to pursue his state action allegations because of the many differences between the facts of *Tarkanian* and the allegations of respondent's complaint. *Id.* 4a-5a. In particular, while the NCAA and UNLV had acted as adversaries in *Tarkanian*, respondent's complaint "describe[d] a pattern of collusion between the University and the NCAA." *Id.* 4a. And unlike Tarkanian, who had not suggested any impropriety in the agreement between the NCAA and UNLV, here respondent had specifically alleged joint activity in the intimidation of student-witnesses and the suborning of false testimony. *Id.* 4a-5a. Taking care to note that "the NCAA may be able to rebut [respondent's] claims and show that it did not engage in concerted action with the University," the court of appeals remanded because these "non-conclusory allegations

combined with others in the complaint, if proven, could show that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty." *Id.* 5a.

REASONS FOR DENYING THE WRIT

This case presents an unremarkable application of this Court's state action jurisprudence in which the Second Circuit's summary order holds only that the NCAA is not categorically immune from § 1983 liability and remands for factual development of a plaintiff's claims. Because this interlocutory order is correct on the law, creates no circuit split, and establishes no controlling precedent, this Court's review would amount to nothing more than fact-bound error correction.

For purposes of 42 U.S.C. § 1983, this Court has consistently held that a private actor may face liability if its conduct is fairly attributable to the state and that one of the "host of facts . . . [that] can bear on the fairness of . . . [such] an attribution" is whether a "private actor operates as a 'willful participant in joint activity with the State or its agents.'" *Brentwood I*, 531 U.S. at 296. The Second Circuit, distinguishing this Court's decision in *Tarkanian*, held that the NCAA *could* face § 1983 liability given the non-conclusory factual allegations in respondent's complaint. Such a holding falls squarely within this Court's state action jurisprudence.

I. The Procedural Posture of the Case and the Limited Nature of the Second Circuit's Decision Make It Inappropriate for Review.

The Second Circuit's order rested on a particular, narrow ground: based on its conclusion that the district court had erroneously deemed petitioner NCAA categorically exempt from liability as a state actor, the court of appeals remanded the case to the district court for proceedings to continue. Respondent will have the opportunity for discovery to prove his allegations, and petitioners will have ample opportunity to rebut those allegations. Once some initial discovery has occurred, moreover, petitioners are free to file a motion for

summary judgment. The district court can then "sift[]" and "weigh[]" the facts and circumstances in light of this Court's state action precedents. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). If petitioners disagree with the district court's ultimate disposition, they are free to seek review in the Second Circuit and, if appropriate, this Court.[3]

The petition dramatically asserts that if certiorari is denied, the order below will open the floodgates of litigation against petitioner NCAA in connection with its frequent investigations and enforcement of sanctions at state universities. Pet. 30. This is simply untrue. In most cases, potential plaintiffs will be unable, consistent with the NCAA's practices, the behavior of their employers, and the pleading rules, to make the kind of non-conclusory allegations that can survive a motion to dismiss. The NCAA's claim is also belied by the narrowness of the court of appeals' ruling – that the NCAA merely is not per se exempt from liability under § 1983 – and respondent's unique allegations – namely, that the NCAA and SUNY Buffalo had engaged in concerted action, including myriad improprieties, to deprive him of his constitutional rights. The Second Circuit certainly did not hold that the NCAA's investigative and enforcement activities, standing alone, would constitute joint action and subject it to liability; nor does the NCAA have any justification to claim that such a result would follow in the mine run of cases. As this Court explained in an analogous context, even after a lower court had held that the Tennessee Secondary School Athletic Association was a state actor for purposes of that case, there was absolutely no evidence of a "litigation explosion." *See Brentwood I*, 531 U.S at 289. And even if petitioners'

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[3] Moreover, because on remand the case could still come out in the NCAA's favor – either because it could show that it was not a state actor or because it ultimately prevails on the merits of respondent's § 1983 claim – the NCAA has not made a compelling showing that this Court should take the extraordinary step of granting review to correct the alleged error in this case.

predictions of a torrent of litigation were to come to pass, this Court would then have ample opportunities to close the floodgate in a case involving a precedential lower-court opinion and a fully developed record.

Indeed, this Court recently denied certiorari in *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir.), *cert. denied*, 76 U.S.L.W. 3058 (2007), which sought review of the Eighth Circuit's holding that a private non-profit corporation was a state actor because it had engaged in joint activity with the city. That case would have offered a better vehicle to consider the state action question: it was on appeal from a final judgment that provided the court of appeals with a fully developed record on which to base its thorough state action analysis. To the extent that the Court might want to consider the joint participation question, the proximity of these two cases demonstrates that other, better vehicles will later present themselves.

II. The Allegations Involved in This Case Bring It Squarely Within This Court's State Action Jurisprudence.

1. In contrast to petitioners' caricature, the order below – viz., rejecting the NCAA's argument that it is categorically exempt from liability as a state actor under § 1983 – is entirely consistent with this Court's precedents. The district court's holding, echoed by the NCAA, that it can never be regarded as a state actor is insupportable.

Section 1983 grants a private right of action to individuals whose constitutional rights have been violated by a party acting under color of state law. Because the NCAA does not dispute that respondent has adequately alleged a violation of his Fourteenth Amendment due process rights, this case presents only the question whether the NCAA acted under color of state law.

When, as here, a party claims that he has been deprived of his rights under the Fourteenth Amendment, § 1983's under-color-of-state-law requirement turns on whether the alleged

violator can be characterized as a "state actor" for purposes of the Fourteenth Amendment. *See Tarkanian*, 488 U.S. at 182 n.4. As this Court has explained, a private party can be deemed a state actor if "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood I*, 531 U.S. at 295 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)) (internal quotation marks omitted).

This Court has refused to rely solely on the *identity* of the actor to determine whether state action exists, and has instead repeatedly held that the inquiry into whether a private party is a state actor is highly fact-specific. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999). On that basis, this Court has rejected precisely the kind of bright-line rule that petitioners seek to impose. In *West v. Atkins*, for example, this Court held that the Fourth Circuit had "misread [the decision in] *Polk County* [*v. Dodson*, 454 U.S. 312 (1981),] as establishing the general principle that professionals do not act under color of state law when they act in their professional capacities." 487 U.S. 42, 51 (1988). Thus, although *Polk County* held that public defenders do not act under color of law for § 1983 purposes with respect to their representation of their clients, the Court has held them amenable to suit under § 1983 when they make personnel decisions, *Branti v. Finkel*, 445 U.S. 507 (1980), and when they conspire with state officials to deprive their clients of federal constitutional rights, *Tower v. Glover*, 467 U.S. 914 (1984).

The state action determination instead rests on the analysis of the facts surrounding the challenged *conduct* of the private party. Whether a "private actor operates as a willful participant in joint activity with the State or its agents" is one of "a host of facts that can bear on the fairness of . . . an attribution" of a private party's "seemingly private behavior" to the state. *Brentwood I*, 531 U.S. at 296 (internal quotation marks omitted). The "joint participation" theory has its origins in *Burton*, in which the Court held that a private restaurant

which leased space in a public building could be held liable for racial discrimination under § 1983 in light of the symbiotic relationship between the state and the restaurant. 365 U.S. 715 (1961). Reasoning that the state agency's financial success depended on the profits from the restaurant, the Court concluded that the restaurant was a state actor because the "State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity." *Id.* at 725.

Other such factors bearing on whether private conduct can be attributed to the state include, for example, when the state exercises "coercive power," "when the state provides significant encouragement, either overt or covert," when a private entity "is controlled by an agency of the State," "when it has been delegated a public function by the State," "when it is entwined with governmental policies, or when government is entwined in [its] management or control." *Brentwood I*, 531 U.S. at 296 (internal citations and quotation marks omitted).

In short, "[f]rom the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient." *Brentwood I*, 531 U.S. at 295. Even under petitioners' limited conception of the "joint participation" theory, the relevant inquiry in a case such as respondent's is, at bottom, whether there is a sufficiently close nexus between the state and the challenged action to treat the seemingly private behavior as action of the state itself. *Id.*

2. Given the non-conclusory allegations of joint activity set forth in respondent's complaint, the court of appeals was correct to remand this case. Respondent alleges that the NCAA acted jointly with SUNY Buffalo to willfully violate his due process rights via a pattern of cooperation riddled with improprieties. In a letter to the NCAA on August 3, 1999, a MAC employee first raised the issue of an alleged infraction of NCAA rules by respondent, referring to "documentation

offered by the school." Pet. App. 28a. In response, "the NCAA advised SUNY that it was assumed [respondent] was guilty of major NCAA rule violations and . . . should be forced to resign." *Id.* The university forced respondent's resignation as head men's basketball coach on December 3, 1999. *Id.*

After respondent resigned, the NCAA and SUNY Buffalo acted together against him to ensure that NCAA sanctions would preclude him from coaching at any other NCAA school. The NCAA and SUNY jointly gathered and presented coerced, falsified, and tainted evidence against respondent. In one instance, the NCAA requested interviews with students who had exhausted their NCAA eligibility and thus fell outside the NCAA's influence. *See* Pet. App. 30a. To force the students' compliance with the NCAA's wishes, SUNY officials "misled and improperly advised student-athletes that if they did not comply with the NCAA request for an interview the issuance of their degrees could be at risk." *Id.* In another instance, NCAA employees "used and relied upon information provided by SUNY Buffalo officials including affidavits the [NCAA officials] knew were coerced, false and otherwise tainted" and further "willfully and recklessly changed testimony in order to implicate [respondent]." *Id.* The NCAA and SUNY then together "knowingly and carelessly permitted" this jointly tainted evidence to be presented and used against respondent at the NCAA's February 9, 2001, hearing. *Id.*

These instances of improper cooperation culminated in the NCAA issuing a damning report entitled "University at Buffalo, The State University of New York Public Infractions Report," which SUNY accepted "in its entirety" at a joint press conference with the NCAA. *Id.* 31a. In the report, the NCAA imposed sanctions "to keep [respondent] from being able to coach in any NCAA school." *Id.* And, in "retaliation against [respondent]'s attempts to defend himself," the report found major violations for what "[i]n over 300 cases before and since . . . the NCAA uniformly ruled . . . minor violations." *Id.* Moreover, even though the NCAA Appeals Committee later

found many aspects of the case against respondent "troublesome" and reprimanded the NCAA Committee on Infractions for "not interviewing key witnesses; inconsistent investigation; using certain troublesome language involving the ethical conduct violation; [and] the rationale for the ethical finding," neither the NCAA nor SUNY revoked the report. *Id.* 32a. The report remains part of respondent's file and "continues to be disclosed by the [NCAA] and State University officials to all prospective future employers of [respondent]." *Id.* 31a-32a.

Improper cooperation in which the state and the private party share a joint mission contrasts greatly with circumstances in which the state merely approves of or acquiesces in the challenged private act.[4] Contrary to the petition's assertion, Pet. 13-14, however, respondent does not allege that state action arises merely from SUNY Buffalo's compliance with the NCAA's otherwise private investigatory and enforcement rules. Instead, respondent alleges improper concerted actions – which the Second Circuit characterized as a "pattern of collusion," Pet. App. 4a – between the NCAA and SUNY, which violated respondent's constitutional rights. Both the NCAA and SUNY took steps to coerce, taint, and manipulate evidence; both knowingly allowed such evidence to be used against respondent to further a common mission of establishing a case against him; and both jointly endorsed and disseminated

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[4] In *Jackson v. Metropolitan Edison Co.*, for example, petitioner filed suit against her utility company alleging that it acted under color of law when, in a manner authorized under state law, it shut off her electricity. 419 U.S. 345, 347 (1974). The Court rejected this claim, holding that heavy and detailed state regulation, standing alone, did not transform the private utility's decision into state action. *Id.* at 358. Because the state did not participate in, request, or cooperate in the suspension of service, but merely permitted it, the utility's action could not be fairly attributable to the state. *Id.* at 355 n.15, 358; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (private insurer's decision to withhold payment for disputed medical treatment was not fairly attributable to the state because decision was merely made with state permission).

a report based on the tainted and false evidence. Because of these improper joint activities, the NCAA can be held liable under § 1983.

Respondent's allegations of improper cooperation between petitioners and SUNY support a § 1983 claim against the NCAA in light of this Court's state action jurisprudence. In *Adickes v. S.H. Kress & Co.*, a white woman brought a civil rights suit against a private restaurant for refusing her service when accompanied by her African-American students. 398 U.S. 144, 146 (1970). This Court reversed the lower court's grant of summary judgment to the defendant in light of evidence that the restaurant may have improperly cooperated with a police officer. *Id.* at 157. The Court found that the petitioner's unrebutted allegations of the presence in the restaurant of a police officer who later arrested the petitioner for vagrancy demonstrated a genuine issue of material fact that the restaurant acted as a willful participant in joint activity with the state. *Id.* at 157-58. "If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a [restaurant] employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Id.* at 158.

A similar corrupt agreement subjected private parties to suit under § 1983 in *Dennis v. Sparks*, 449 U.S. 24 (1980). In *Dennis*, respondents claimed that private individuals who bribed a judge to enter an illegal injunction deprived them of their property interests without due process of law. *Id.* at 28. The Court held that the private actors, by entering into a corrupt agreement with the judge, rather than "merely resorting to the courts and being on the winning side of a lawsuit," acted under color of law as willful participants in joint action with the state. *Id.* at 28-29. Similarly, here the NCAA did not act under color of law simply because SUNY Buffalo cooperated with the NCAA in its normal investigative and enforcement procedures, but instead because the NCAA and the university

took joint actions in light of a corrupt agreement to deprive respon[illegible] of his liberty interest in his reputation and to destroy [illegible] ability to pursue his chosen occupation without due process of law.

3. Petitioners argue that this case warrants certiorari because this Court has purportedly limited the joint participation theory to the facts of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), *Burton*, 365 U.S. 715 (1961), and express allegations of conspiracy.[5] Pet. 10-13. But that argument rests on a few statements from this Court torn from their factual context.

Petitioners' position cannot be reconciled with this Court's precedents over the nearly five decades since its decision in *Burton*, during which time this Court has applied the joint participation theory in a variety of different contexts. In *Gilmore v. City of Montgomery*, for example, when African-American citizens of Montgomery sought to enjoin the municipality from permitting segregated school groups to use public recreational facilities, the Court remanded for a sifting of the facts and weighing of the circumstances to determine "whether [the city's] involvement makes the city 'a joint participant in the challenged activity.'" 417 U.S. 556, 573-74 (1974).

Similarly, several years after this Court's decision in *Lugar*, this Court disposed of Coach Tarkanian's joint participation claim – which arose in a context wholly different from *ex parte* attachments – not by relying on petitioners' cramped construction of the joint participation theory, but instead by undertaking a fact-specific analysis that ultimately did not find sufficient cooperation or coinciding interests to support a finding of joint action. *See Tarkanian*, 488 U.S. at

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[5] Notably, petitioners' argument largely rests not on this Court's precedent, but on dissenting opinions. *See* Pet. 11 (citing *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 636 (1991) (O'Connor, J., dissenting); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting)).

197 n.16. And in *West*, this Court held that a private physician who treated an inmate could be held liable under § 1983 based on the "joint effort[s]" of, and "cooperative" relationship between, medical personnel and prison officials. 487 U.S. at 51; *see also Brentwood I*, 531 U.S. at 296 (listing a private party's "willful participa[tion] in joint action with the State," without qualification or limitation, as a factor pointing towards state action).

Nor does this Court's opinion in *Lugar* support petitioners' cramped construction of the joint participation theory. In *Lugar*, this Court considered a § 1983 claim, brought by a debtor against a corporate creditor, alleging that the prejudgment attachment of the debtor's property constituted "state action" that deprived him of his due process rights. 457 U.S. at 922. Emphasizing that the debtor had challenged the state prejudgment attachment statute as "procedurally defective," and in light of its prior precedents regarding "the applicability of due process standards to such procedures," the Court agreed with the debtor that the creditor's joint participation with the state rendered it a state actor. *Id.* at 941-42.

To be sure, the Court in *Lugar* did state its holding narrowly, but in so doing it by no means limited the application of the joint participation theory exclusively to cases involving prejudgment attachments. Instead, the Court explained that although in prejudgment attachment cases, "joint participation" did not "require[] something more than invoking the aid of state officials to take advantage of state-created attachment procedures," 457 U.S. at 942, in other contexts the "mere invocation of state legal procedures" would not necessarily suffice to show joint participation, *id.* at 939 n.21.[6]

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[6] Similarly, although in *American Manufacturers* this Court indicated that *Lugar*'s relatively low bar for finding joint action was limited to cases in which a private party attempts "to seize the property [of another] by an *ex parte* application to a state official," 526 U.S. at 58, nothing in *American Manufacturers* rules out a possible finding of joint action in cases involving

4. Nor is there merit to petitioners' assertion that the summary order below conflicts with this Court's decision in *Tarkanian*. In that case, this Court's decision that the NCAA did not act under color of law relied heavily on three specific factual circumstances, each of which is absent from this case.

First, in rejecting Tarkanian's claims, this Court repeatedly emphasized that the relationship between the NCAA and UNLV did not involve any cooperation. The Court explicitly pointed to the adversarial relationship between the school and the NCAA: "In the case before us the state and private parties' relevant interests do not coincide . . . ; rather, they have clashed throughout the investigation, the attempt to discipline Tarkanian, and this litigation. UNLV and the NCAA were antagonists, not joint participants, and the NCAA may not be deemed a state actor on this ground." *Tarkanian*, 488 U.S. at 196-97 n.16; *see id.* at 196 ("During the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth."). Indeed, the Court noted, UNLV had sought to protect its "winningest" coach and ultimately suspended him to avoid having additional sanctions imposed on the school itself. *Id.* at 195-98. By contrast, respondent's complaint alleges precisely the kind of cooperative relationship between the NCAA and SUNY Buffalo that was absent in *Tarkanian*. *See supra* at 5-6.

Second, the conduct at issue in *Tarkanian* – Coach Tarkanian's suspension from his coaching position – was

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true collusion or improper cooperation between private actors and state officials.

Petitioners' contention (at Pet. 12) that this Court has carved out a narrow exception to the so-called *Lugar* rule for allegations of conspiracy falls short for two reasons: it relies on a chronological sleight of hand, as it suggests that *Adickes* and *Dennis* limited *Lugar*, when in fact they preceded it; and it fails to account for language in *Dennis* which establishes that a conspiracy is only one form of joint activity that can be attributed to the state, *see Dennis*, 449 U.S. at 28 (state action arises by being a "co-conspirator *or* a joint actor" with a state official (emphasis added)).

imposed directly by UNLV. 488 U.S. at 192. Because Tarkanian sought to hold the NCAA liable as a state actor for its role in the suspension, this Court explained that "[t]his case uniquely mirrors the traditional state-action case" in which "a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Id.* Because the NCAA could not directly suspend the coach, the Court focused on whether the adoption of the NCAA's rules by the state school turned the NCAA into a state actor. *Id.* at 194-95. In light of the fact that UNLV at all times retained the authority to withdraw from the NCAA and set its own standards, the Court concluded that it did not. *Id.*

Here, by contrast, respondent alleges that actions directly taken by the NCAA deprived him of his liberty interest in his reputation. This case *is* "the traditional state-action case" in which the relevant state action inquiry is "whether [SUNY] participated to a critical extent in the NCAA's activities." *See* 488 U.S. at 192-93. Respondent alleges that the NCAA itself knowingly relied on evidence, which SUNY and the NCAA jointly coerced and tainted, to conduct its hearing and issue the March 21, 2001 public report. Under this Court's precedent, the complaint alleges sufficient facts to show that SUNY jointly participated in the NCAA's actions. *See supra* at 11-15.

Third, this Court in *Tarkanian* emphasized that "there [was] no suggestion of any impropriety respecting the agreement between the NCAA and UNLV." 488 U.S. at 197 n.17. The Court explained that improper joint conduct by a private party and the state can support a finding of state action, especially when the state provides the private entity "with governmental powers to facilitate [the private party's actions]." *Id.* at 197-98. But in *Tarkanian*, the Court found no such facilitation; it thus specifically contrasted the lack of impropriety in *Tarkanian* with the facts of *Adickes* and *Dennis*, noting that the "conspirators in *Dennis* became state actors when they formed the corrupt bargain with the [state agent],

and remained so through completion of the conspiracy's objectives." *Id.* at 197 n.17.

Here, by contrast, respondent's complaint alleges ample facts in support of the claim that such improprieties tainted the relationship between the NCAA and SUNY. Respondent alleges that the university cooperated with the NCAA in suborning false testimony, Pet. App. 29a; that NCAA officials tampered with evidence and accepted evidence from SUNY officials that they "knew [was] . . . false," *id.* 30a; and that NCAA and SUNY Buffalo officials knowingly permitted this tainted and false evidence to be used against respondent, *id.* The NCAA then issued the March 21, 2001 report "carrying a badge of authority bestowed by" SUNY Buffalo, and both the NCAA and SUNY Buffalo subsequently held a joint press conference at which SUNY Buffalo accepted the report in its entirety. *Id.* 30a-31a.

These factual differences distinguish this case from *Tarkanian*. Respondent in no sense challenges the everyday NCAA investigations and enforcement of its rules and regulations as state action. Instead, he challenges only the improper joint actions of the NCAA and SUNY depriving him of due process.

Much of petitioners' reliance on *Tarkanian* amounts to the assertion that the NCAA, by its very nature, can never be deemed a state actor when it conducts an investigation. But such a categorical rule is not the law. *See supra* at 10-11. Rather, this Court's decision in *Tarkanian* rested on the facts of that case. *See Tarkanian*, 488 U.S. at 193 ("[T]he question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."). And indeed, even the NCAA itself declined to advance such a categorical rule in *Tarkanian*, in which it instead relied on the facts of that case to argue that it was not a state actor because of the lack of "a

close nexus between the state and the challenged activity."[7] Br. of Pet'rs 42, *Tarkanian*, 488 U.S. 179 (No. 87-1061); *see* Reply Br. of Pet'rs 8-9, *Tarkanian*, 488 U.S. 179 (No. 87-1061) (arguing that the challenged activity in *Tarkanian* "[was] the NCAA's imposition of sanctions, not UNLV's response to those sanctions," over which the NCAA had no power).

The NCAA cannot now transform its limited victory in *Tarkanian* into a blanket exemption from *all* liability under § 1983. State action has consistently been found under § 1983 based on improper agreements between private entities and the state to violate individuals' constitutional rights. The same holds when the NCAA and agents of the state jointly and willfully act to violate individuals' rights. To find otherwise would allow the NCAA to escape liability no matter how egregious its joint activities with the state.

5. After arguing that certiorari is warranted to "clarify the 'joint participation' test for state action," Pet. 6, petitioners nonetheless (and paradoxically) suggest that the joint participation theory is sufficiently well-defined that the Court "may also wish to consider summary reversal" in this case, *id.* 7. As the foregoing discussion makes clear, no "clarification" is necessary, as petitioners' narrow construction of the joint participation theory lacks any basis in this Court's precedents. Nor would summary reversal be appropriate, as this is not a case in which the lower court either overlooked or incorrectly applied the law. Instead, the Second Circuit discussed *Tarkanian* at length and ultimately remanded this case for further proceedings in light of the myriad distinctions that it found between *Tarkanian* and this case.

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[7] *See* Pet. 13-14 (arguing that here, just as in *Tarkanian*, "the adversarial nature of the NCAA's investigation and enforcement activities precludes any inference of conspiracy from joint action"); Pet. C.A. Br. 15 (in *Tarkanian* "the Supreme Court ruled, as a matter of law, that . . . state action could not be attributed to the actions of [the NCAA]").

III. The Circuit Conflict Alleged by Petitioners Is Illusory.

As the Second Circuit's rules, case law, and the order below all make clear, the order of the court of appeals remanding the case to the district court for further proceedings lacks precedential value and is not binding within the Second Circuit itself, much less other circuits. *See* 2d Cir. R. § 32.1(b) (dispositions by summary order); *In re Am. Tobacco Co.*, 866 F.2d 552, 555 (2d Cir. 1989) (a non-precedential ruling does not commit the court). Thus, the order below simply could not create an actual conflict, much less one warranting this Court's review.

In any event, petitioners' effort to conjure up a split among the courts of appeals rests on snippets from a few cherry-picked cases. In fact, virtually *all* of the circuits have recognized that a private party may be held liable under the joint participation theory. No court of appeals would have affirmed the per se rule of the district court in this case.

Contrary to petitioners' assertions that the First, Third, and Fourth Circuits "have questioned the continuing vitality of the joint participation test" and that the Fifth and Sixth Circuits "have explicitly limited the holding of *Lugar* to the narrow context of prejudgment attachment," Pet. 15-16, four of these courts have allowed § 1983 cases against private parties to proceed under the joint participation theory outside the prejudgment attachment context,[8] while the fifth has – without

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[8] **1st Cir.**: *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10-11 (1st Cir. 1998) (private psychiatrists who evaluated but failed to alleviate the risks associated with a mentally unstable police officer are subject to suit as "joint participants in the challenged activity"), *cert. denied*, 525 U.S. 1105 (1999). Contrary to petitioners' claims, Pet. 17, the First Circuit did not limit the scope of joint participation as a basis for state action liability in *Perkins v. Londonberry Basketball Club*, 196 F.3d 13, 20-21 (1st Cir. 1999) (finding no state action, but declining to determine whether or to what extent *Burton* remained good law because there was no "symbiotic relationship" of interdependence and joint participation in the case at hand). Instead, the First Circuit continues to apply the "nexus/joint action test" without limiting its applicability to the facts of *Lugar* or *Burton*. *See*

Estades-Negroni v. CPC Hosp. San Juan Capestrano, 412 F.3d 1, 6-7 (1st Cir. 2005).

3d Cir.: *Abbott v. Latshaw*, 164 F.3d 141, 147-48 (3d Cir. 1998) (ex-husband's complaint contained sufficient allegations of joint action with state officials to support claim against ex-wife as a private party under § 1983), *cert. denied*, 527 U.S. 1035 (1999). Petitioners' reliance on *Crissman v. Dover Downs Entertainment Inc.*, Pet. 17, is misplaced as that case deals with the "symbiotic relationship" test, which the Third Circuit considered to be distinct from the joint action inquiry. 289 F.3d 231, 242 (3d Cir. 2002) (en banc) (quoting with approval *Brentwood I*'s discussion of "willful participa[tion] with the State or its agents" as a fact supporting state action, while observing that "[n]otably absent [in the *Brentwood I* discussion] is any reference to the 'symbiotic relationship test'"). Since its decision in *Crissman*, the Third Circuit has confirmed that private actors may be held liable under § 1983 based on the joint participation theory. *Leshko v. Servis*, 423 F.3d 337, 340 (3d Cir. 2005) (one "factual category" supporting a finding of state action "involves [a private entity engaging in] an activity that is significantly encouraged by the state or in which the state acts as a joint participant" (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Lugar*) (emphasis omitted)); *see also Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 195-96 (3d Cir. 2005) (addressing applicability of joint participation theory without limiting theory to *ex parte* attachments), *cert. denied*, 126 S. Ct. 2325 (2006).

5th Cir.: *Auster Oil & Gas v. Stream*, 764 F.2d 381, 387 (5th Cir. 1985) (complaint alleged sufficient facts to find private landowner subject to suit under § 1983 as "a willful participant in joint action" with police officers hired for an illegal search), *cert. denied*, 488 U.S. 848 (1988). *Davis Oil Co. v. Mills*, 873 F.2d 774, 780-81 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989), cited by petitioners, Pet. 17, did not limit joint participation to the facts of *Lugar*, but rather applied *Lugar*'s "low threshold" for joint participation in a case involving an *ex parte* deprivation of property. The Fifth Circuit has continued to recognize the validity of the joint participation theory to determine whether action took place under color of law without limiting the theory to either prejudgment attachments or the facts of *Burton*. *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999).

6th Cir.: *Am. Postal Workers Union, Local 96 v. City of Memphis*, 361 F.3d 898, 905-06 (6th Cir. 2004) (allegations supported finding that private employer and security agency acted as willful participants in joint activity with police to violate constitutional rights). The Sixth Circuit

limiting the theory's applicability to cases involving prejudgment attachments – recognized that a private party may be held liable under the joint participation theory.[9] Similarly, of the remaining courts of appeals, five have permitted cases not involving prejudgment attachments to proceed under the joint participation theory,[10] and the final circuit has recognized

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recognizes that joint participation can satisfy its test for state action, applying a civil conspiracy standard when there are "allegations of cooperation or concerted action" in which private individuals "willfully participate in joint action with state agents." *Id.* at 905 (citing *Dennis* and *United States v. Price*, 383 U.S. 787, 794 (1966)). The most recent Sixth Circuit case cited by petitioners acknowledges that this test is appropriate for cases involving "allegations of concerted action between state and private actors." *Revis v. Meldrum*, 489 F.3d 273, 290-91 (6th Cir. 2007). Because it describes in detail the concerted actions of the NCAA and SUNY Buffalo, respondent's complaint would satisfy this test.

[9] **4th Cir.**: *Mentavlos v. Anderson*, 249 F.3d 301, 311 (4th Cir.) (noting that one factor supporting a finding of state action is when "the private actor operates as a 'willful participant in joint activity with the State or its agents'" (citing *Brentwood I*, 531 U.S. at 296)), *cert. denied*, 534 U.S. 952 (2001).

[10] **7th Cir.**: *Brokaw v. Mercer County*, 235 F.3d 1000, 1016 (7th Cir. 2000) (finding child's relatives subject to suit under § 1983 for joint action with police via a conspiracy to have child declared ward of the state and forcibly removed from his parents' home). Petitioners' reliance on the two categories of conduct outlined in *Proffitt v. Ridgway*, 279 F.3d 503, 507-08 (7th Cir. 2002), is misplaced. Pet. 22-23. In cases that postdate *Proffitt*, the Seventh Circuit has found that a private party may act under color of law for purposes of § 1983 if "the private individual was a willful participant in joint activity with the state or its agents." *See, e.g.*, *Thurman v. Vill. of Homewood*, 446 F.3d 682, 687 (7th Cir. 2006).

8th Cir.: *Wickersham v. City of Columbia*, 481 F.3d 591, 597-99 (8th Cir.) (private nonprofit corporation properly held liable under § 1983 for First Amendment violations at air show because corporation "acted jointly and intentionally with the police pursuant to a 'customary plan'"), *cert. denied*, 76 U.S.L.W. 3058 (2007).

9th Cir.: *Berger v. Hanlon*, 129 F.3d 505, 514-16 (9th Cir. 1997), *vacated*, 526 U.S. 808 (1999), *judgment reinstated by* 188 F.3d 1155 (9th Cir. 1999) (finding warranted search jointly planned by private media

– again, without limiting the application to prejudgment attachments – that a private party may be held liable when it operates as a "willful participant in joint activity with the State or its agents."[11]

The NCAA attempts to further perpetuate the illusion of a circuit split by positing that respondent "obviously could not have satisfied any of the Fourth Circuit's 'exclusive' tests for state action." Pet. 16 (citing *DeBauche v. Trani*, 191 F.3d 499 (4th Cir. 1999), *cert. denied*, 529 U.S. 1033 (2000)). However, it omits mention of subsequent opinions by that court explaining that, although in cases such as *DeBauche* it had "identified four circumstances under which the Supreme Court had held that a private party may be deemed a state actor for purposes of § 1983 liability," those circumstances are *not* in fact exclusive. *Mentavlos v. Anderson*, 249 F.3d 301, 313 (4th Cir.), *cert. denied*, 534 U.S. 952 (2001). Instead, as the court explained, the "ultimate inquiry" is whether "there [is] a sufficiently 'close nexus' between the challenged actions of [the private party] and the State . . . such that their actions 'may be fairly treated as that of the State itself.'" *Id.* at 314 (citing *Brentwood I*, 531 U.S. at 296).

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companies and the U.S. Fish and Wildlife Service subjected the media companies to liability under § 1983 as a joint participant).

10th Cir.: *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999) (finding private detoxification facility could be liable under § 1983 as a willful participant in joint action if its concerted action with state officials led to unconstitutional seizures).

11th Cir.: *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277-79 (11th Cir. 2003) (finding a genuine issue of material fact that advertising company's billboard restrictions amounted to state action because of company's joint action with a state agency).

[11] **D.C. Cir.**: *Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991) (recognizing that joint activity involving "overt and significant state participation in the challenged action" can subject a private party to § 1983 liability), *cert. denied*, 503 U.S. 967 (1992).

IV. There Is No Need to Clarify That Actions Fairly Attributable to the State Constitute Actions "Under Color of" State Law for Purposes of § 1983.

The NCAA argues in the alternative that, even if its actions are fairly attributable to the state, certiorari is nonetheless warranted to clarify that it did not act "under color of law." It posits that "an ill-considered generalization in this Court's opinion in *Lugar* [makes] it difficult for the lower courts to draw . . . sensible distinctions" between what constitutes "state action" and actions "under color of law." Pet. 18; *see id.* 21-22 (contending that "*Lugar* has confused lower courts" because it suggests "that if a private party's conduct is state action" then the private party "has acted 'under color of law' for purposes of § 1983"). However, because the NCAA did not raise this argument in either the district court or the court of appeals, it has waived the argument.

In any event, petitioners' novel argument is contrary to this Court's case law. This Court in *Lugar* squarely held that "[i]f the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983." *Lugar*, 457 U.S. at 935. Indeed, *Lugar* adopted precisely the opposite premise from what petitioners would have this Court assume: *Lugar* explained that not all "conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action," *id.* at 935 n.18, because the "under color of" law requirement is *broader* than the state action doctrine. The language cited by petitioners is thus hardly an "ill-considered generalization." Pet. 18. To the contrary, this Court has repeatedly and unquestioningly followed it.[12] Moreover, in light of such clear

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[12] *See, e.g.*, *Brentwood I*, 531 U.S. at 295 n.2 ("If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes."); *Am. Mfrs.*, 526 U.S. at 50 & n.8 ("Where, as here, deprivations of rights under the Fourteenth Amendment are alleged, these two

precedent, the circuit courts have unanimously followed this Court's lead.[13]

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requirements [i.e., "the state-action requirement of the Fourteenth Amendment" and "the under-color-of-state-law element of § 1983"] converge."); *West v. Atkins*, 487 U.S. 42, 49 (1988) ("In *Lugar* . . . the Court made clear that if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983.'").

[13] **1st Cir.**: "For Appellees to have acted under color of state law, their actions must be 'fairly attributable to the State.' In other words, it must be fair to characterize them as state actors." *Estades-Negroni*, 412 F.3d at 4 (citations omitted).

2nd Cir.: "If a defendant's conduct satisfies the state action requirement under the Fourteenth Amendment, then that conduct also constitutes action 'under color of' state law for purposes of § 1983." *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 229 (2d Cir. 2004).

3rd Cir.: "We consider actions 'under color of law' as the equivalent of 'state action' under the Fourteenth Amendment." *Leshko*, 423 F.3d at 339.

4th Cir.: "[I]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, it also constitutes action 'under color of state law' for the purposes of § 1983." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 n.1 (4th Cir.), *cert. denied*, 540 U.S. 822 (2003).

5th Cir.: "[A] section 1983 plaintiff, alleging the deprivation of Due Process under the Fourteenth Amendment, must also show that state action caused his injury. In such cases, the 'under color of law' and state action inquiries merge into one." *Priester v. Lowndes County*, 354 F.3d 414, 421 (5th Cir. 2004) (citation omitted).

6th Cir.: "[A] private entity can be held to constitutional standards [under §1983] when its actions so approximate state action that they may be fairly attributed to the state." *S.H.A.R.K. v. Metro Parks Serving Summit County*, --- F.3d -----, 2007 WL 2403663 (6th Cir. Aug. 24, 2007).

7th Cir.: "To state a § 1983 claim based on a Fourteenth Amendment violation . . . the challenged conduct must also constitute state action. These two requirements—color of law and state action—are functionally equivalent." *Tarpley v. Keistler*, 188 F.3d 788, 791 (7th Cir. 1999). *Proffitt*, on which petitioners rely, *see* Pet. 22, and discussed *supra* at note 10, does not discuss the relationship between the "under color of law" and state action requirements but instead addresses only the question of

The NCAA suggests that even if its actions are attributable to SUNY Buffalo so that SUNY Buffalo could fairly be held responsible for the challenged conduct, it does not follow that the NCAA acted under color of law. This argument rests, however, not on this Court's precedents, but instead on Justice Powell's *dissenting* opinion in *Lugar* and a hypothetical involving a state official who coerces a private employer to fire an employee of whose speech the state official disapproves.[14] Pet. 20. In such a scenario, the NCAA argues,

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state action – specifically, what type of behavior "transforms [a private actor] into a state actor." 279 F.3d at 508.

8th Cir.: "If a party's conduct meets the requirements for state action, the same acts also qualify as actions taken 'under color of state law' for purposes of § 1983." *Wickersham*, 481 F.3d at 597.

9th Cir.: "Conduct that is actionable under the Fourteenth Amendment as State action is also action under color of State law supporting a suit under § 1983." *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir.), *cert. denied sub nom. Or. Arena Corp. v. Lee*, 536 U.S. 905 (2002).

10th Cir.: "[S]tate action necessarily constitutes action under color of state law." *Pino v. Higgs*, 75 F.3d 1461, 1464 (10th Cir. 1996) (noting that "under color of state law" requirement might be broader than state action).

11th Cir.: "We have noted that the concepts of action under color of state law and state action are coterminous." *Almand v. DeKalb County, Ga.*, 103 F.3d 1510, 1513 n.7 (11th Cir. 1997).

D.C. Cir.: "For the kind of conduct at issue here, the 'under color of state law' standard of § 1983 and the 'state action' requirement for a claim under the Constitution are synonymous." *LaRouche v. Fowler*, 152 F.3d 974, 988 n.18 (D.C. Cir. 1998).

[14] The NCAA attempts to bolster its argument that it cannot be deemed to have acted under color of law by citing language from this Court's decision in *Blum* "recogniz[ing] . . . that ordinary § 1983 cases against public officials are 'obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State.'" Pet. 19 (citing *Blum*, 457 U.S. at 1003)). This argument is undermined, however, by this Court's acknowledgement – at the end of the same paragraph – that cases involving private-party defendants nonetheless "shed light upon the analysis necessary to resolve" cases such as *Blum*, in which the defendants were

even if the state may fairly be blamed for the firing, the private employer has done only what it had a right to do in the absence of intervention by the state. *Id.* Even if petitioners' novel analysis were correct in an appropriate context, that hypothetical has nothing to do with the facts of this case, in which respondent does not allege that SUNY Buffalo coerced the NCAA into action.[15]

Effectively acknowledging that the overwhelming weight of authority is against it, petitioners invent (without any citation to the case law, and again for the first time in this case) a new test that it proposes as the "correct analysis in 'joint participation' settings." Pet. 22. But respondent would meet even the more stringent standard imposed by petitioners' proposed test. As respondent's complaint alleges in detail, petitioners *did* wield delegated state power, and *did* conspire with state officials to induce them to violate their official duties. *See supra* at 11-13. In any event, whether respondent can meet petitioners' "test" is irrelevant: this Court has never suggested that "joint participation" should be so limited with

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state officials. *Blum*, 457 U.S. at 1004. In any event, nothing in this Court's opinion in *Blum* – which considered only whether, for purposes of a suit brought under the Fourteenth Amendment, the state could be held responsible for decisions by private nursing homes to transfer or discharge Medicaid patients – addressed the circumstances in which a private party acts under color of law for purposes of § 1983.

[15] As discussed above, *see supra* note 13, there is no conflict among the circuits with regard to whether the "state action" and "under color of law" inquiries are the same in a case brought under § 1983. The decisions of the Ninth and Third Circuits that petitioners describe as "embrac[ing] the insight that if state action is found on the ground that government officials coerced the private conduct, that should support an action against the state but not against the private party" are not to the contrary. Pet. 23. Instead, those cases merely address whether government compulsion, unaccompanied by allegations of joint willful activity, can transform a private party into a state actor. Even to the extent that those cases might conflict with other cases presenting similar scenarios, such a conflict is irrelevant to this case, which does not involve any allegations of government compulsion or coercion.

regard to § 1983's "under color of" state law requirement and has no occasion to do so now.

V. There Is No Need for This Court to Vacate and Remand the Decision Below in Light of *Bell Atlantic v. Twombly*.

Disregarding the Second Circuit's express finding that respondent's complaint stated "non-conclusory allegations," Pet. App. 5a, petitioners argue in the alternative that this Court should grant certiorari, vacate the decision below, and remand this case to the Second Circuit for further consideration in light of *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007). This Court should reject petitioners' invitation because respondent satisfies *Twombly*'s pleading standard and thus a GVR will serve no purpose.

In *Twombly*, the respondents charged major telecommunications providers with an antitrust conspiracy in violation of section 1 of the Sherman Act, citing their parallel conduct as suggestive of illicit conspiracy. 127 S. Ct. at 1962-63. This Court held that respondents had failed to state a claim because independent parallel conduct – standing alone – does not compel an inference of an unlawful agreement, and Twombly's allegations to the contrary were merely conclusory. Moreover, because the complaint failed to provide petitioner with sufficient notice of any specific antitrust violations, reasonable discovery would be nearly impossible. *See id.* at 1967 (plaintiffs sued "America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years"). The Court emphasized that Fed. R. Civ. P. 8(a)(2) did not set a "probability requirement," *id.* at 1965, but instead requires that a complaint raise "enough facts to state a claim to relief that is plausible on its face," *id.* at 1974. *See also Erickson*, 127 S. Ct. at 2200 (describing the liberal pleading standards and citing *Twombly* for this proposition).

Here, respondent alleges far more than just parallel, independent conduct. His complaint makes specific factual allegations – which the Second Circuit specifically deemed "non-conclusory" – of joint conduct between the NCAA and SUNY Buffalo that provide petitioners with sufficient notice of respondent's claims. *See supra* at 1-7. Furthermore, discovery – which has thus far been denied – would be limited to specific, identifiable events occurring over a limited time frame, so that the concerns animating *Twombly* would simply not apply here.

In any event, a GVR is unnecessary as a practical matter. The Second Circuit's summary order simply remanded this case back to the district court, which when it evaluates the allegations of the complaint is bound by *Twombly* (as well as *Erickson*), as is the Second Circuit in any subsequent appeal. Remanding to the Second Circuit would add nothing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
PETITIONERS,

v.

TIMOTHY M. COHANE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

The brief in opposition reads as if the defendant here were SUNY-Buffalo—arguing that the only relevant question is whether the NCAA's private conduct may be "fairly attributed" to the state. Like the Second Circuit, and the respondents in *American Manufacturers Mutual Insurance Co. v. Sullivan*, Cohane suggests that "we need not concern ourselves with the 'identity of the defendant,'" 526 U.S. 40, 50 (1999) (citation omitted), or "the target of the remedy sought," Laurence H. Tribe, *American Constitutional Law* § 18-1, at 1689 n.10 (2d ed. 1988). Whether the state may fairly be blamed for a private decision, however, is "obviously different from those cases in which the defendant is a private party." *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). Cohane nevertheless fails to address—indeed, seems to embrace—the Second Circuit's misconception that *the University's* willful participation in the NCAA's private activity could subject *the NCAA* to constitutional liability.

As the *amicus* briefs make clear, that holding would subject to constitutional challenge the most mundane day-to-day actions of private and public entities. Am. Council on Educ. Br. at 8–12; Nat'l Fed'n of State High Schs. Ass'ns, et al. Br. at 7–13. It conflicts with decisions of this Court and other circuits, and condones an intolerable invasion into the sphere of private freedom that the state-action doctrine is designed to protect.

1. The petition explained that this Court and several justices have criticized the "joint participation" test of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Pet. 11–12. And in *Sullivan*, this Court held that although *Lugar* "contains general language about 'joint participation' as a test for state action ... its language must not be torn from the context out of which it arose." 526 U.S. at 58.

Cohane concedes that *Sullivan* limited "*Lugar*'s relatively low bar for finding joint action," but argues that it is still "possible" for "joint action" to be found where there is

"improper cooperation" between the state and a private party. Opp. at 16–17 n.6. Cohane's position appears to be that so long as a plaintiff inserts the word "improper" before describing any parallel or cooperative conduct of private and governmental parties, a constitutional claim is alleged. *E.g.*, Opp. at 12, 13, 14, 17, 18, 19, 20 (invoking the word "improper" eleven times). As the petition explained, however, the only continuing validity of the "joint participation" test outside of the facts of *Burton* and *Lugar* is cases involving allegations that a private party conspired with a state actor to commit an *official act* that is obviously unlawful and directly harms the plaintiff. In *Adickes v. S.H. Kress & Co.*, it was an agreement for the officer to arrest a white teacher because she was attempting to eat with her black students. 398 U.S. 144, 172 (1970). In *Dennis v. Sparks*, it was allegations "that *an official act of the defendant judge* was the product of a *corrupt conspiracy* involving bribery of the judge." 449 U.S. 24, 28 (1980) (emphasis added); *see also Tarpley v. Keistler*, 188 F.3d 788, 792 n.2 (7th Cir. 1999) (noting that in *Adickes* and *Dennis* "the state actor's actions unquestionably caused the injury"). In each case, the private party was liable because it conspired with state actors to wield state power to do something genuinely corrupt and obviously unlawful.[1]

2. Cohane's principal theory, like the Second Circuit's, is that conspiracy allegations are unnecessary because the NCAA somehow becomes a state actor if "the University

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[1] Cohane accuses Petitioners of "a chronological sleight of hand," Opp. at 16 n.6, because *Lugar* came after *Adickes* and *Dennis*. The point is that *Lugar*'s expansion of *Adickes* and *Dennis* was promptly limited to pre-judgment attachment cases by *Lugar* itself (and later more forcefully by *Sullivan*) leaving the theory of *Adickes* and *Dennis* as the governing—and only—"joint participation" test for state action.

Cohane also looks to *West v. Atkins*, 487 U.S. 42, 51 (1988), for support. Opp. at 16. But this Court has made clear that in *West* "the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private physician gave rise to a finding of state action." *Sullivan*, 526 U.S. at 55 (describing *West*).

willfully participated in joint activity with the NCAA," Pet. App. 5a, or if the university engaged in any "improper cooperation" with the NCAA. Cohane's absurd suggestion that the NCAA's liability as a state actor turns on whether *the University* cooperates points directly at the fundamental problem with the Second Circuit's analysis. A private party's liability cannot depend on what the state chooses to do. That would "intolerably broaden ... the notion of state action under the Fourteenth Amendment," *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 n.10 (1978).

Cohane essentially argues the case for holding SUNY liable by framing the issue as whether it is fair to attribute the NCAA's conduct *to the University*.[2] But when a private party is sued for damages under §1983, it is not enough to find "state action" in the fact pattern; it must also be fair to "attribute" the use of state authority to the private defendant—such that it became a "state actor" or (put differently) acted "under color of law." Cohane's argument that "the complaint alleges sufficient facts to show that SUNY jointly participated in the NCAA's actions," Opp. at 18, says nothing about whether the NCAA wielded state power or whether "governmental authority ... dominate[d] [the] activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

3. Perhaps realizing that his (and the Second Circuit's) principal argument simply cannot be right, as a backup Cohane tries to make this case sound more like *Dennis* and

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[2] *E.g.*, Opp. at 10 ("Whether a 'private actor operates as a willful participant in joint activity with the State or its agents' is one of 'a host of facts that can bear on the fairness of ... an attribution' of a private party's 'seemingly private behavior' to the state.") (citation omitted); *id.* at 4 ("It is well-settled that the statute's provisions extend to private act[ion] when th[ose] actions are 'fairly attributable' to the state."); *id.* at 7 (a "'host of facts ... bear on the fairness of ... [such] an attribution'") (citation omitted); *id.* at 18 ("This case *is* 'the traditional state-action case' in which the relevant state action inquiry is 'whether [SUNY] participated to a critical extent in the NCAA's activities.'").

Adickes, by occasionally describing the NCAA's alleged conduct as "collusion" with the University. These are word games. The complaint alleges only parallel independent conduct and cooperation by the University with the NCAA's private investigation, but no meeting of the minds on any unlawful objective or means. *E.g.*, Pet. App. 30a (alleging that both participated in presenting the case against him). Every allegation cited by the Court of Appeals as demonstrating "collusion" was an allegation about what *the university* alone did, Pet. App. 4a–5a ("In particular, the complaint alleges that *the University* forced Cohane's resignation ..., actively participated in the case against Cohane ..., intimidated student-witnesses ... by threatening to wrongfully withhold their degrees, suborned perjury ..., and adopted the Report and its findings ....") (emphasis added), and begs the question whether the NCAA could have done anything differently to keep its own conduct—"improper" or not—from being transformed from a state law tort into conduct regulated by the Constitution. And Cohane's allegation that SUNY officials were "under the control of the NCAA," Pet. App. 30a, (or as he rephrases it in the opposition without any record citation—worked "at the NCAA's behest," Opp. at 5), when "SUNY officials threatened to withhold the students' degrees unless they complied with NCAA investigators," Opp. at 2, is just a conclusory assertion. Cohane never alleged that this "control" was anything more than SUNY's desire to comply with its membership obligations. This Court has already held that "even if we assume that a private monopolist can impose its will on a state agency ..., it does not follow that such a private party is therefore acting under color of state law." *NCAA v. Tarkanian*, 488 U.S. 179, 198–99 (1988).

There is no genuine allegation that NCAA conspired to receive or itself used any state power. The basic allegations against the NCAA—that it "took steps to coerce, taint, and manipulate evidence," suborned perjury, or "disseminated a report based on the tainted and false evidence"—are only claims that the NCAA committed state law torts in the

course of investigating the allegations, interviewing witnesses, and presenting or considering evidence. Opp. at 13–14. These are not constitutional claims.

Cohane's suggestion that a conspiracy to abuse official power might be *inferred* from the University's cooperation is inconsistent with the settled law underlying *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). This issue arises frequently in antitrust cases, and the rule is that a secret conspiracy may not be inferred from evidence that is also consistent with independent parallel activity.[3] Surely the rule should be no less stringent when evaluating "joint participation" state action allegations.

That suggested inference is also flatly inconsistent with *Tarkanian*. Cohane argues that his "complaint differs materially from Tarkanian's allegations," Opp. at 5, because the NCAA and UNLV acted like "adversaries," while Cohane alleges a cooperative relationship. But UNLV assisted NCAA investigators "to locate and obtain information from persons with pertinent information," Brief for Pet'r, at 12, *Tarkanian*, 488 U.S. 179 (No. 87–1061), and Tarkanian pointed to the NCAA's letter to UNLV's president asking for his "cooperation and assistance to the end that complete information related to this matter may be developed," Br. for the Resp't at 11, *Tarkanian*, 488 U.S. 179 (No. 87-1061) ("Tarkanian Br."). Like Cohane, Tarkanian also emphasized UNLV's cooperation during the investigation and hearing,[4] and argued that the NCAA

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[3] *See Twombly*, 127 S. Ct. at 1966 ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."); *Jacob Blinder & Sons, Inc. v. Gerber Prods. Co. (In re Baby Food Antitrust Litig.)*, 166 F.3d 112, 122 (3d Cir. 1999) ("[N]o conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons."); 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* §§1410b, 1414, 1417b, 1417g, 1433a, 1434a, 1434c2 (2d ed. 2003).

[4] *Compare* Tarkanian Br. at 15–16 ("[T]he 'burden of proof' is shared jointly by both the NCAA enforcement staff and the institution. It is not a prosecutor-defense legal proceeding; rather, it is a cooperative administrative effort which ... is designed to place the responsibility for

could not have completed its work without UNLV's help. This Court's point in *Tarkanian* was that UNLV and the NCAA were in an inherently adversarial *posture*, which precluded any fair characterization of their parallel or "joint" activity as a conspiracy to violate Tarkanian's rights. The same is true here. SUNY was sanctioned in this investigation. Cohane's suggestion that his allegations are unique and that permitting them to go forward would not result in more lawsuits against the NCAA is entirely hollow. These allegations are just like Tarkanian's and other cases cited in the petition, Pet. 5 n.1, specifically, *Harrick v. Bd. of Regents of University of Georgia*, No. 04-0541, slip. op. (N.D. Ga. Apr. 15, 2004), and the NCAA is often sued by players or coaches alleging "cooperation" by a university.[5]

4. Cohane is able to argue that the circuits are not in conflict only because his peculiar view of the law allows him to disregard the crucial distinction between cases satisfying the requirements of *Dennis* and *Adickes* (a conspiracy to abuse official power) and cases like this one involving far less rigorous versions of the "joint participation" test. The conflict is not over *Dennis*-type claims, but rather over the application of *Burton* and *Lugar* beyond their unique facts.

Cohane argues, for example, that despite the fact that at least the Fourth, Fifth, and Sixth Circuits have explicitly

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determining the facts on the shoulders of both the institution and the enforcement staff in an effort to assist the Committee on Infractions in arriving at appropriate judgments.") *with* Opp. at 2 ("officials from both the NCAA and SUNY Buffalo participated in presenting the case against respondent at a January 2000 hearing of the Mid American Conference"); *id.* at 3 ("On February 9, 2001, respondent appeared at the hearing conducted by the [NCAA] Committee on Infractions. Both NCAA and SUNY officials participated in the hearing.").

[5] The district court did not hold that the NCAA is categorically exempt from §1983 liability. It held that it was "not persuaded by Plaintiff's argument that SUNY's cooperation ... with the NCAA transformed its otherwise private conduct into state action," Pet. App. 16a, and that "[u]nder the circumstances, it cannot be said that SUNY Buffalo's alleged complicity in this investigation somehow transforms the NCAA's well-established private conduct into state action," *id. at* 17a. In other words, it rejected Cohane's weak attempts to distinguish *Tarkanian*.

limited *Lugar*'s joint participation theory to pre-judgment attachment cases (as this Court instructed), Pet. 16–18, those and other courts have still permitted §1983 liability against private parties "under the joint participation theory outside the prejudgment attachment context." Opp. at 21–24. But Cohane is only saying that the courts that have limited *Burton* and *Lugar* have not limited *Dennis* and *Adickes*. Cohane simply cites cases permitting *Dennis* allegations to go forward,[6] or cases that cite *Burton* or *Lugar* when rehashing the history of this Court's jurisprudence,[7] or cases that are totally inapposite.[8] None of the cases cited in his footnotes 8–11 support Cohane's position, and several endorse the NCAA's argument.[9]

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[6] *See Abbott v. Latshaw*, 164 F.3d 141, 147–48 (3d Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999) (allegations satisfy *Dennis* where private party conspired with and paid police officer to repossess a car for her); *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 385–88 (5th Cir. 1985) (jointly planned scheme to illegally enter property under the authority of the police, disassemble oil pipelines to insert microchips to track the flow of oil); *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 905–06 (6th Cir. 2004) (allegations that police conspired with company officers to threaten and intimidate striking workers with police authority); *Revis v. Meldrum*, 489 F.3d 273, 290–91 (6th Cir. 2007) (acknowledging that a conspiracy to abuse official power states a claim and citing *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002), cited in the petition (at 22–23) as establishing the correct standard).

[7] *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999); *Leshko v. Servis*, 423 F.3d 337, 340 (3d Cir. 2005),

[8] *See Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 7–8 (1st Cir. 2005); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10 (1st Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999).

[9] *See Brokaw v. Mercer County*, 235 F.3d 1000, 1016 (7th Cir. 2000) (conspiracy with police to have a child declared by officials a ward of the state; acknowledging that there could be no liability if all the parties did was act independently); *Thurman v. Village of Homewood*, 446 F.3d 682, 687 (7th Cir. 2006) (*Dennis* case acknowledging that a private party does not act under color of law when it does something that a private citizen is entitled to do without state assistance, regardless of state official's contributing conduct in the fact pattern); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277–79 (11th Cir. 2003) (private party was acting as a surrogate for the state and therefore with state authority); *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584,

Cohane incorrectly suggests that the Fourth Circuit's decision in *DeBauche v. Trani*, 191 F.3d 499, 507–08 (4th Cir. 1999), *cert. denied*, 529 U.S. 1033 (2000), was limited by *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir.), *cert. denied*, 534 U.S. 952 (2001). Opp. at 24. After a long discussion of this Court's state action jurisprudence, *Mentavlos* just stated that "[a]lthough not directly pertinent to the state action inquiry here, state action has also been found in circumstances where a private actor operates as a 'willful participant in joint activity with the State or its agents.'" 249 F.3d at 311 (quoting *Lugar*, 457 U.S. at 941). It in no way intimated that, contrary to *DeBauche*, a private actors' conduct could be converted into state action merely by some contributing conduct by a state actor, nor did it conduct any joint participation inquiry. This case would still have been dismissed under *DeBauche* in the Fourth Circuit.

5. Cohane has no response to the obvious force of Justice Powell's dissent in *Lugar*, and essentially concedes that at least in the state coercion cases a finding that a private party's conduct is fairly attributable to the state may not warrant a conclusion that it was a state actor or acted "under color of law." Opp. 27–28. He also concedes that the circuits are split on that issue, but wrongly suggests that the "conflict is irrelevant" because the theory of state action here was joint participation not state coercion. Opp. at 28 n.15.[10] But the same basic insight applies; holding a private

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596 (10th Cir. 1999) (board composed of state officials and therefore entwined with the state); *Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 967 (1992) (commenting that where a private party receives overt and significant state participation, such that it is effectively granted state authority, it is acting under color of law); *Berger v. Hanlon*, 129 F.3d 505, 514–15 (9th Cir. 1997), *cert. denied*, 525 U.S. 961 (1998) (reasoning that "the joint action test ... is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a government actor and a private party," and finding "not only a verbal agreement, but a written contractual commitment" allowing media to enter private land "under the government's cloak of authority.")

[10] In a case decided after the petition was filed, a concurring Sixth Circuit judge found that a private corporation that registers and

party liable requires some real inquiry into whether the conduct found to be state action is genuinely attributable to the private party. This case would resolve the conflict over the coercion cases while clarifying the broader underlying confusion that conflict stems from.[11]

6. This Court's denial of review in *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir.), *cert. denied*, 76 U.S.L.W. 3168 (U.S. Oct. 9, 2007), is irrelevant. The private party was given complete control over the city's police force in order to enforce private speech restrictions. *Id.* at 595.[12]

7. Cohane suggests that review is inappropriate because this case was resolved on a motion to dismiss. This Court

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maintains records of thoroughbred horses, "did not act 'under color of' law for purposes of §1983" when it denied the plaintiff the use of his preferred name, despite finding that "[w]ith respect to Defendant K[entucky] H[orse] R[acing] A[uthority]," the state entity that denied plaintiff the ability to race his horse unless properly registered, "I conclude that state action is present." *Redmond v. The Jockey Club*, No. 05-6607, 2007 WL 2250978, at *7 (6th Cir. Aug. 2, 2007) (Clay, J., concurring).

[11] Cohane wrongly suggests that the NCAA waived the argument that it did not act under color of law. The NCAA argued below that the state's conduct could not convert its private conduct into state action and that it did not act under color of law, Mem. of Law in Supp. of Motion To Dismiss, at 8 (W.D.N.Y. Oct. 1, 2004) ("MTD"), and that Cohane's reliance on *Lugar* was misplaced, Reply Mem. in Further Supp. of MTD, at 4 (W.D.N.Y. Jan. 21, 2005). The same arguments were made on appeal. *E.g.* Br. of Defs.-Appellees, at 6–7 (2d Cir. May 26, 2006) ("Mere cooperation with a public institution is insufficient to convert private decisions into state action."). That is just another way of saying that even if the state's conduct qualifies as "state action," that does not mean that the NCAA's conduct was "under color of law." And, the "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted); *see also* Robert L. Stern et al., *Supreme Court Practice* § 6.25, at 421 (8th ed. 2002).

[12] Cohane also repeatedly cites *Brentwood Academy v. TSSAA*, 531 U.S. 288 (2001), but never seriously argues that the "entwinement" theory would apply here. A finding of entwinement regarding the specific conduct at issue effectively means that the private party is an alter ego for the state and acts with state authority; thus, it would always be a proper defendant.

resolved many of the seminal state action cases in the same posture, including ones Cohane relies upon. *E.g.*, *Sullivan*, 526 U.S. 40; *Lugar*, 457 U.S. 922; *Polk County v. Dodson*, 454 U.S. 312 (1981); *Dennis*, 449 U.S. 24; *Flagg Bros.*, 436 U.S. 149. State action must be resolved at this stage to ensure that private parties are not lightly forced to run the gauntlet of §1983 litigation. The unpublished nature of the decision also has little significance. Citation to unpublished opinions is permitted under the Federal Rules, and the Second Circuit's use of a summary order "does not mean that the court considers itself free to rule differently in similar cases," 2d Cir. R. 32.1 cmt. Nor is this the first time the Second Circuit has ignored this Court's attempts to limit *Lugar*. *See Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1146 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

8. A GVR in light of *Twombly* is insufficient. It would do nothing to correct the legal standard that governs state action determinations in this and future cases. If this Court nevertheless declines review of the state action issue, a GVR is certainly warranted. The Second Circuit twice invoked the "no set of facts" standard this Court rejected in *Twombly*, and interpreted it to permit a complaint to go forward whenever discovery might uncover some facts to support the claim (under the court's own flawed conception of the governing legal standard). Cohane's notion that a GVR would serve no purpose because the district court will apply *Twombly* in any event is plainly incorrect. The purpose of a GVR *in every case* is to alert the lower courts to the need to apply new precedent. There is no reason to assume the district court would entertain reconsideration of the NCAA's Rule 12(b)(6) motion in contravention of the Second Circuit's mandate if this Court has refused to GVR in light of *Twombly*. Without this Court's intervention the case will proceed forward through discovery. It may later be dismissed *on summary judgment*, but that defeats the whole purpose of the *Twombly* rule.

CONCLUSION

The petition for certiorari should be granted.

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Petitioners,

v.

TIMOTHY M. COHANE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF THE AMERICAN COUNCIL ON EDUCATION, ET AL. IN SUPPORT OF PETITIONERS

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BRIEF AMICI CURIAE OF THE AMERICAN COUNCIL ON EDUCATION, ET AL. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae, a group of organizations that together represent most of the institutions of higher education in the United States, submit this brief in support of petitioners.

Founded in 1918, the American Council on Education ("ACE") is the nation's unifying voice for higher education. Its more than 1,800 members include a substantial majority of colleges and universities in the United States.[1] ACE

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[1] Pursuant to this Court's Rule 37.6, amici note that no part of this brief was authored by counsel for any party, and no person or entity other than amici or their members made a monetary contribution to the preparation or submission of the brief. The brief is

represents all sectors of American higher education—public and private, large and small, denominational and nondenominational. It serves as a consensus leader on key issues and seeks to influence public policy through advocacy, research, and program initiatives.

Amicus the American Association of Community Colleges ("AACC") is the primary advocacy organization for the nation's more than 1,100 two-year, degree-granting institutions. Organized in 1920, AACC promotes the causes of its member colleges through, among other things, legislative advocacy, monitoring of national issues and trends, and research and publication of news and scholarly analysis.

Amicus the Association of American Universities ("AAU") was founded in 1900 by a group of 14 universities offering the Ph.D. degree. The AAU currently consists of 62 leading research universities in the United States and Canada. The association assists members in developing national policy positions on issues that relate to academic research, graduate and professional education, and the transfer of innovative technology from university to industry.

Amicus the National Association of State Universities and Land-Grant Colleges ("NASULGC"), founded in 1887, is the nation's oldest higher education association. NASULGC's members include 214 institutions in all 50 states, the U.S. territories, and the District of Columbia. Among their number are 17 historically black public institutions and 31 tribal colleges that became land-grant institutions in 1994 and are represented through the NASULGC membership of the American Indian Higher Education Consortium.

Amicus the National Association of Independent Colleges and Universities ("NAICU") is an association of nearly 1,000 member colleges and associations that represents the interests

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filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

of private colleges and universities. Members include traditional liberal arts colleges, major research universities, comprehensive universities, church- and faith-related institutions, historically black colleges, single-sex colleges, art institutions, two-year colleges, and schools of law, medicine, engineering, business, and other professions.

Amicus the American Association of State Colleges and Universities ("AASCU") represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its territories. AASCU schools enroll more than three million students, which is roughly 55 percent of the enrollment at all public four-year institutions.

Amicus the Association of American Medical Colleges ("AAMC") is a non-profit organization representing all 126 allopathic medical schools in the United States, nearly 400 teaching hospitals and health systems, and 94 academic and professional societies representing nearly 110,000 faculty members. AAMC serves and leads the academic medical community in improving the nation's health through medical education, research, and high-quality patient care.

Amicus the Association of Jesuit Colleges and Universities ("AJCU") represents the 28 Jesuit higher education institutions throughout the United States. AJCU is a voluntary association whose mission is to enhance quality Jesuit higher education throughout the country while working together on common mission, purpose and goals.

Amicus the Council for Higher Education Accreditation ("CHEA") is the principal nongovernmental body responsible for recognition of higher education accrediting entities. The largest institutional higher education membership organization in the United States, CHEA has approximately 3,000 degree-granting colleges and universities as members. It recognizes 60 accrediting entities, including the six re-

gional accrediting associations and various specialized, national, and professional accrediting organizations.

These organizations participate as *amici curiae* only in cases that in their estimation raise issues of widespread importance to institutions of higher education nationwide. ACE, for example, has filed briefs *amicus curiae* in this Court in recent years in cases such as *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738 (2007), and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). And though these organizations rarely lend *amicus* support at the certiorari-petition stage, they have chosen to do so here because they are deeply troubled by the Second Circuit's decision. The rule that the Second Circuit embraced—that a private entity may be deemed a state actor under a "joint activity" theory based on actions taken by the state, not the private entity itself—would often leave private colleges and universities exposed to Section 1983 liability when they interact with state bodies. The Second Circuit's rule would hurt public colleges and universities too; their private partners would have reason to shy away from public educational institutions to avoid Section 1983 exposure of their own. The legal principle the Second Circuit embraced, in short, could inflict enormous harm on public and private colleges and universities throughout the United States.

SUMMARY OF ARGUMENT

The Second Circuit held that a private entity (the National Collegiate Athletic Association) may be deemed to have engaged in "joint activity" with the state, and thus may be treated as a state actor, by virtue of events in which it did not participate and of which it had no knowledge—here, the unilateral actions of officials at SUNY-Buffalo. *See* Pet. App. 3a-5a. That holding is extraordinary in its ramifications. Under the Second Circuit's approach, private entities that enter into just about any relationship with the state—even a relationship that has consistently been deemed not to

compromise an entity's classification as private—expose themselves to potential Section 1983 liability. This is so because the private entity cannot know when or whether the state organ will take some action that will constitute "joint activity" and push it over the line into "state actor" status. The Second Circuit's holding thus strips private entities of control over the circumstances in which their otherwise private conduct might be deemed state action. This unprecedented approach threatens to "intolerably broaden * * * the notion of state action under the Fourteenth Amendment." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 160 n.10 (1978).

The Second Circuit's novel rule poses unique risks to America's institutions of higher education, both private and public. As to the former, interactions between private colleges and universities on the one hand, and state agencies and officials on the other, are pervasive: Private institutions accept state-sponsored scholarships, they engage in state-funded research, they collaborate with state universities, and they undergo state licensure proceedings, to name but a few. Courts have long held that such interactions with the state do not transform private institutions into state actors liable under Section 1983. But if the Second Circuit's rule is permitted to stand, these workaday interactions would become a costly civil-rights lawsuit waiting to happen. Public colleges and universities, likewise, rely heavily on interactions with private entities. Yet under the Second Circuit's rule, those private entities would have a strong incentive to reduce, draw back from, or indeed never initiate these interactions, lest they expose themselves to Section 1983 liability that they cannot control.

These unfortunate effects would not, of course, be limited to the field of higher education. As Petitioners rightly point out, the Second Circuit's approach would mean federal civil-rights exposure for "all private actors that sometimes work in conjunction with government agencies." Pet. 9. Because this expansion of the state-action doctrine is unjust and illogical,

as well as improper under this Court's binding precedents, the Court should grant the petition for certiorari and reaffirm the sensible state-action limits the Second Circuit has eschewed.

ARGUMENT

I. THE SECOND CIRCUIT'S APPROACH WOULD HARM PRIVATE AND PUBLIC INSTITUTIONS ALIKE.

The Second Circuit held that respondent Timothy Cohane stated a Section 1983 cause of action because he alleged that the NCAA was a " 'willful participant in joint activity with the state.' " Pet. App. 3a (quoting *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)). The trouble with this holding is that the NCAA's usual interactions with its pubiic member institutions do not make the NCAA a state actor, *see generally National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988), and Cohane alleges no facts suggesting any "joint activity" over and above those usual interactions. Instead, Cohane alleges—and the Second Circuit relied on—nothing more than facts regarding the university's unilateral actions. He alleges, for example, that "the *University* forced [his] resignation * * * in an attempt to pla ate the NCAA," that the *university* "intimidated student-witnesses into giving false statements to NCAA investigators," and that "the *University* used its authority to compel witnesses to testify against him." Pet. App. 3a-4a (emphases added).[2] Cohane's allegation, in a nutshell, is that the NCAA did nothing more or less than what it does in every investigation. But under the Second

[2] He also alleges that the university engaged in these acts under the "control" of the NCAA, but as Petitioners explain, the "control" Cohane alleges is, on the face of the complaint, "simply the University's own desire to comply" with NCAA rules. Pet. 26. This Court has held that that desire does not make the NCAA a state actor. *Id.* (citing *Tarkanian*, 488 U.S. at 191).

Circuit's newly minted version of the "joint activity" test, that is enough to transform the NCAA into a state actor.

This rule conflicts with this Court's teachings on the narrowly circumscribed joint-activity test, *see* Pet. 10-15, and it makes no sense in any event. If the state-action inquiry is intended to identify private actors who have been " 'clothed with the authority of state law,' " *Tarkanian*, 488 U.S. at 191 (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)), the Second Circuit's rule misses the mark by ensnaring private actors who do not fit that description. It "sweeps much too broadly" by "subject[ing] to constitutional scrutiny * * * action result[ing] from the exercise of private choice." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 411-412 (1995) (O'Connor, J., dissenting).

The potential implications of such a rule for America's colleges and universities are deeply worrisome. These educational institutions operate against a background understanding that certain types of public-private interaction—state scholarship funding, licensure decisions, and the like—will not without more transmogrify private entities into "state actors." *See* Anthony Ciolli, *Grade Non-Disclosure Policies: An Analysis of Restrictions on M.B.A. Student Speech to Employers*, 9 U. Pa. J. Lab. & Emp. L. 709, 721 (2007) (noting that "lower courts have not treated private universities as state actors" and collecting cases). The Second Circuit's decision sweeps that certainty out from under them and leaves their status as state actors *vel non* in the hands not of their own employees and agents, but of the state itself. This approach threatens to harm private educational institutions, as well as the private partners of public institutions, by ensnaring them in federal civil-rights litigation even where they are engaging in wholly private behavior.

A. The Decision Below Exposes Private Institutions To Liability Whenever They Interact With The State.

1. Private colleges and universities interact with organs of the state in countless ways. One common example is their receipt of scholarship funds and other funding from state coffers. In New York, for example, the New York State Tuition Assistance Program (TAP) provides scholarship funds for financially needy students to assist with tuition payments. Students can use these funds to pay for tuition to private universities.[3] And in Kansas, a number of state-sponsored scholarships administered by the State Board of Regents, including the Kansas Ethnic Minority Scholarship and the Kansas Comprehensive Grant, are available to state residents planning to attend private colleges.[4] Most if not all states have such programs, and by necessity, the programs create formalized interaction between state officials and the private colleges and universities whose students receive funds.[5] Nonetheless, the courts "[q]uite consistently * * * have not found state action" on this basis. *Allen* v. *Tulane Univ.*, 1993 WL 459949, at *2 (E.D. La. 1993) (collecting cases).

The Second Circuit's expansive new rule would potentially change all that. Consider, for example, a case where the state discriminates against a particular scholarship applicant,

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[3] *See* New York University, Office of the Bursar, *TAP (Tuition Assistance Program), available at* http://www.nyu.edu/bursar/loans.awards/tap.html.

[4] *See Financial Aid Sources for Kansas Students, available at* http://www.kansasregents.org/download/financialaid/FAFKS%2007-08%20App.pdf.

[5] In New York, for example, universities help students learn how to apply for TAP funds and the state imposes GPA and other requirements on TAP recipients. *See supra* n.3.

causing a private university to notify the student that there are no funds to disburse to her. Under the Second Circuit's logic, this unilateral action by the state could conceivably result in a holding that the private university is a state actor by virtue of "joint activity." This result would fly in the face of common sense, for the university in this scenario has done nothing (over and above its usual private activities) to invoke the power of the state.

2. Private colleges' and universities' attempts to police fiscal accountability could also suffer under the Second Circuit's rule. Many state laws require private colleges and universities to report to the state any fraud or misappropriation of state-provided funds, such as student aid and research grants.[6] Typically, both the educational institution and the designated state organ then investigate the alleged fraud. But under the Second Circuit's approach, this common procedure could expose private educational institutions to unprecedented Section 1983 liability. After all, any unilateral step by the state investigating agency that happens to advance the school's inquiry could be deemed "joint activity" as the Second Circuit now defines it.

3. Many states also have procedures permitting college and university students to file complaints with the state regarding matters such as overbilling by the school, misrepresentation by the school of its licensure status, or even discrimination committed by a school official.[7] Here, again, the Second Circuit's approach could create private-school liability where there heretofore was none. If the state investigative agency were to inform the accused college or university of the

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[6] *See, e.g.*, Louisiana State University, *Policy Statement: Student Employment* (citing Louisiana law), *available at* http://www.lsu.edu/financialaid/PS+33+R04.pdf.

[7] *See, e.g*, State of Wisconsin Education Approval Board, *Student Complaints*, *available at* http://eab.state.wi.us/resources/complaint.asp.

investigation, and were to take some unilateral step (like SUNY-Buffalo did in *Cohane*) that has the effect of advancing the educational institution's parallel investigation, the institution could be deemed a state actor under the joint-activity doctrine in a subsequent lawsuit by the student. This result would follow under the Second Circuit's rule even if the school had done nothing to collaborate or collude with the state in the investigative process.

4. Another common fact pattern involves security forces at private institutions interacting with municipal or state police in the course of handling a crime. The courts have typically held in these cases that, short of some action on the part of a security guard demonstrating active collusion with the police to violate a suspect's rights, the security guard (and his university employer) are not state actors. In *Sanders* v. *City of Minneapolis*, 474 F.3d 523 (8th Cir. 2007), for example, a security guard at Augsburg College saw a car driving on the sidewalk, followed it, and radioed a report that was transmitted to the Minneapolis Police Department. Officers from the Minneapolis Police Department—not the college's security guard—later shot and killed the car's driver. *Id.* at 525-526. The district court dismissed the security guard and the college from the ensuing Section 1983 lawsuit, and the Eighth Circuit affirmed, noting that the security guard "did nothing more than follow" the suspect and thus could not be "acting under color of state law." *Id.* at 527. Under the Eighth Circuit's approach, in other words, something more than the security guard's normal (private) activities would be required before he could be deemed a " 'willing participant in a joint action with public servants' " and thus a state actor. *Id.* (quoting *Johnson* v. *Outboard Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999)).

Not so in the Second Circuit. The latter court's "joint activity" rule, as announced in *Cohane*, is so broad that the security guard (and thus the college) could be transformed into a "state actor" based on something the *city* police did

that suggested their desire to act jointly, even if the guard had nothing to do with it. This is an unacceptable result under this Court's state-action doctrine, which is designed to prevent saddling otherwise private parties with open-ended federal liability for actions beyond their control. Absent some attempt by the private actor to "clothe[ ]" itself "with the authority of state law," *Tarkanian*, 488 U.S. at 191 (quotation marks omitted) (quoting *Classic*, 313 U.S. at 326), the private actor is beyond the reach of Section 1983.

5. Private colleges and universities also routinely receive state funds for research. In California, a state agency makes grants and provides loans for research to both public and private research centers. This year, for example, it provided $1.4 million in public funds to Stanford University.[8] And in New Jersey, the state's fiscal 2001 Higher Education Budget allotted $6.5 million to a mix of public and private universities to increase their biomedical and other technology research capacities.[9] The courts have uniformly held that accepting these sorts of grants does not make the private entity a state actor. *See, e.g.*, *Carter* v. *Norfolk Cmty. Hosp. Ass'n*, 761 F.2d 970, 972 (4th Cir. 1985). Universities, in turn, have relied on that settled understanding in conducting their research and educational missions. But the Second Circuit's rule introduces doubt here too. Under its approach, a civil-rights violation committed by the state grant-dispersing organ could be enough to render the private university a state actor, even though the university had done nothing more than accept the funds and use them as it normally would.

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[8] *See* California Institute for Regenerative Medicine, *First Stem Cell Research Facilities Grants Approved* (June 5, 2007), *available at* http://www.cirm.ca.gov/press/pdf/2007/ 06-05-07.pdf.

[9] *See* Lasker Foundation, *Report on State Support for Health Research for Funding First* (Oct. 26, 2001), *available at* http://www.laskerfoundation.org/ffpages/reports/m17.htm.

6. Other examples abound. Private institutions engage in research collaborations with public-sector colleagues,[10] they interact with state agencies in the course of the licensure process,[11] they partner with public secondary schools,[12] and they employ public officials as adjunct faculty, to name a few. Under the Second Circuit's joint-activity test, any of these interactions could trigger a "state action" finding, depending on the acts not of the private institution, but of its state partner. Such an approach flies in the face of this Court's warning not to tear the "joint participation" language of *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982), "from the context out of which it arose." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 57, 58 (1999). And in doing so, it illogically expands private colleges' and universities' exposure to Section 1983 liability by rendering them vulnerable even where they are performing acts that have long been held not to imperil their private status.

B. The Decision Below Would Also Harm Public Colleges And Universities By Punishing Their Private Partners.

Petitioners are correct, therefore, to assert that the Second Circuit's holding imperils "all private actors that sometimes work in conjunction with government agencies." Pet. 9. But its effects do not stop there. The Second Circuit's expansive

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[10] *See, e.g.*, New Mexico Economic Development Department, *New Mexico Technology Research Corridor Collaborative*, *available at* http://www.edd.state.nm.us/index.php?/news/entry/new_mexico_technology_research_corridor_collaborative/.

[11] *See, e.g.*, Ariz. Rev. Stat. Ann. § 32-3022 (mandating licensure for private colleges and universities and setting forth detailed operating standards).

[12] *See, e.g.*, Sean Backe, *Georgetown University and McKinley Technical High School: A Partnership in Hope*, *available at* http://socialjustice.georgetown.edu/research/McKinley_partnership.doc

"joint activity" test also ill-treats *public* actors, such as public colleges and universities, who must partner every day with private institutions—and whose ability to do so may be hampered by a sprawling new test for state action.

1. Take the higher-education accreditation process, for example. Public institutions of higher education must be accredited by a recognized accrediting body, both to fulfill state-law requirements and to be eligible for participation in Title IV of the Higher Education Act of 1965 and its concomitant student-loan programs. *See, e.g.*, 20 U.S.C. § 1001(a)(5) (establishing that certain institutions may qualify as Title IV-eligible "institutions of higher education" if they are "accredited by a nationally recognized accrediting agency or association"). This accreditation process involves regular and lengthy interactions—site visits, exchanges of reports, and the like—between the public institution under review and the private accrediting body.[13] Nonetheless, the federal courts have consistently held that the private accrediting body's accreditation processes do not, in the normal course, convert it into a "state actor." *See, e.g.*, *McKeesport Hosp.* v. *Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 523 (3d Cir. 1994) (collecting cases).

Here, like in all of the situations described above, the Second Circuit's rule would erase that legal certainty and expose accrediting bodies to Section 1983 liability in situations entirely outside their control—namely, those where a public college or university takes unilateral steps to "cooperate" with the accrediting body. Indeed, this scenario is quite similar to the one that actually played out in *Cohane*. Say, for example, that an accrediting body seeks certain informa-

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[13] *See, e.g.*, Western Association of Schools and Colleges' Accrediting Commission for Senior Colleges and Universities, *How to Become Accredited* (Aug. 2006), *available at* http://www.wascsenior.org/wasc/PDFs/HowtoBecomeAccreditedManual8.4.06.pdf.

tion for purposes of preparing its accreditation report, and the public university being reviewed pressures its employees to provide that information. Under the Second Circuit's rule of decision, this action by the public university could convert the private accrediting body into a "state actor," even though the accrediting body did nothing to solicit—indeed, did not even know about—the university's actions. Accrediting bodies accordingly would be forced to conduct their work under a "constant threat of litigation and costly, time consuming, and extensive discovery, not to mention the potential for fee-shifting awards under § 1983." Pet. 9-10. Such a result would defy this Court's command to maintain sensible limits on just how far Section 1983 should intrude into private behavior. *See Lugar*, 457 U.S. at 936.

2. The problem, of course, is not limited to accrediting bodies. Public colleges and universities regularly interact with a whole host of private actors: They collaborate with private colleges and universities on research initiatives,[14] they interact with private primary and secondary schools in student-teaching initiatives, and they perform clinical and research work in private hospitals, to name just a handful. In all of these and many other areas, the Second Circuit's rule threatens to expose public colleges' and universities' private partners to Section 1983 liability by dint of having engaged in their usual activities. Such a rule would give these private partners incentive to minimize their interactions with public colleges and universities. *See* Pet. 9-10 (noting that the Second Circuit's rule "could cripple the [NCAA]'s ability to enforce the rules that its members have agreed upon"). Other private groups, faced with a constant threat of federal litigation over which they have no control, might choose to stop

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[14] *See, e.g.*, Caltech Media Relations, *Caltech Receives $2.5 Million to Further Research in Millimeter-Wave Astronomy* (Feb. 2, 2005) (describing joint research initiative with several public universities), *available at* http://mr.caltech.edu/media/Press_Releases/PR12645.html.

interacting with public institutions of higher education altogether. This result "would be intolerable, for it would tend to hinder and control the progress of higher learning and scientific research." *Greene* v. *Howard Univ.*, 271 F. Supp. 609, 613 (D.D.C. 1967).

II. THE SECOND CIRCUIT'S RULE CONFLICTS WITH THIS COURT'S STATE-ACTION JURISPRUDENCE.

Amici agree with Petitioners that the Second Circuit's opinion conflicts with *Tarkanian*, repudiates this Court's long-stated intention to strictly cabin the "joint activity" test, and precipitates a circuit split with the decisions of other courts of appeals. *See* Pet. 10-15. *Amici* also agree with Petitioners that the joint activity test's "only continuing vitality," if any at all, is in cases "involving express allegations that a private party has *conspired* with a state official to commit an official act that is obviously unlawful and directly harms the plaintiff." Pet. 12 (emphasis added).

Not surprisingly, therefore, the Second Circuit's decision also conflicts with another fundamental tenet of this Court's state-action jurisprudence: that before an otherwise private actor can be said to take a discrete action "under color of state law," there must be positive involvement in the complained-of action by *both* the private party and the state. The Second Circuit's approach cannot be squared with this principle. By holding, in essence, that it takes just one to tango, the Second Circuit flouts this Court's warning that "[c]areful adherence to the 'state action' requirement" is necessary to "preserve[ ] an area of individual freedom by limiting the reach of federal law." *Lugar*, 457 U.S. at 936. And it imperils the ability of America's colleges and universities to police their exposure, and that of their private partners, to Section 1983 liability.

1. In *Flagg Brothers*, 436 U.S. 149, plaintiffs sued a storage company after the company threatened to sell their

belongings to settle an unpaid bill. Because such a sale was permitted under a New York statute, plaintiffs argued that the storage company's action was "properly attributable to the State because the State ha[d] authorized and encouraged it" by enacting the statute. *Id.* at 164. This Court rejected the argument. In reaching that result, this Court reaffirmed that it "has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Id.* Citing *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the Court concluded: "These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.' " *Id.* at 164-165 (citing *Moose Lodge*, 407 U.S. at 190 (Brennan, J., dissenting)).

Likewise, in *American Manufacturers*, 526 U.S. 40, a group of workers sued their private insurers for withholding disability payments pending a disability review process, which state law authorized the insurers to do. *Id.* at 44-47. The workers argued that the insurers were amenable to suit under Section 1983 because, by relying on the statutory authorization, they were acting under color of state law. *Id.* at 47-48. This Court again rejected the argument: "As we have said before, our cases will not tolerate 'the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement.' " *Id.* at 54 (quoting *Flagg Bros.*, 436 U.S. at 164-165)). Nor did it matter that the state took an active role in the disability review process by creating and supervising it: "[A] private party's mere use of the State's dispute resolution machinery, without the 'overt, significant assistance of state officials,' " cannot be considered state action, the Court concluded. *Id.* (quoting *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 486 (1988)).

2. These cases stand for a sensible proposition: Unilateral action—by either a private entity or the state—is not enough to turn a private party into a state actor. And the fact that here the "inacti[ve]" party is the private entity, as opposed to the state, is a distinction without a difference, at least when it comes to the question of the *private* entity's liability. If either half of the equation is missing, the private entity and the state cannot be said to be "virtual agents," *Brentwood*, 531 U.S. at 304, and there is no reason to impose federal civil-rights liability on the private entity.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,

Petitioners,

v.

TIMOTHY M. COHANE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICI CURIAE* THE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS AND THE TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The National Federation of State High School Associations ("NFHS") and the Tennessee Secondary School Athletic Association ("TSSAA") submit this brief as *Amici Curiae* in support of the Petitioner National Collegiate Athletic Association ("NCAA").[1] Founded in 1920, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. About ninety percent of the high schools in the United States are members of state high school athletic or activities associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students and to reduce the risks arising from their participation in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The objectives of the NFHS include the protection of interscholastic athletics and the development of solutions to problems related to interscholastic athletics at the high school level.

The TSSAA is a voluntary association of public and independent secondary schools in the State of Tennessee and is a member of the NFHS. The TSSAA is a private corporate entity. The TSSAA establishes and enforces bylaws under which interscholastic athletic competition

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amici* states that none of the parties or its counsel wrote the brief in whole or in part and that no one other than *Amici* and their counsel made any monetary contribution to the preparation or submission of the brief.

among its member schools is conducted. This Court has previously held that the TSSAA is a "state actor" for purposes of 42 U.S.C. § 1983 because of the entwinement of public school officials in the organization. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001) ("*Brentwood I*").

Based on the purposes underlying the NFHS, its objectives, and its nationwide membership, the NFHS has a strong interest in the extent to which its member associations may be held liable on constitutional claims under 42 U.S.C. § 1983. The NFHS has an equally strong interest in the extent to which private entities or citizens may be deterred from entering into relationships or transactions with its member associations for fear of assuming § 1983 liability under an expansive "joint participation" theory of state action.

Although the TSSAA has been held to be a "state actor" when enforcing its bylaws, "[c]areful adherence to the 'state action' requirement" is necessary to preserve to the TSSAA and similar associations the freedom to conduct operations free from inappropriate constitutional restriction. *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 936 (1982). The TSSAA has a strong interest in the extent to which the "joint participation" theory of state action may be used, in conjunction with the treatment of the TSSAA as a "state actor," to subject private vendors, private service providers, and advertisers or sponsors of the TSSAA, as well as independent school members of the TSSAA, to § 1983 liability. Consequently, both the NFHS and the TSSAA have an interest in this Court's intervention to prevent the Second Circuit's expansive application of the "joint participation" theory of state action.

SUMMARY OF ARGUMENT

The Respondent Cohane claims that the NCAA's report of its investigation and SUNY Buffalo's ratification of the findings in that report defamed him and destroyed his ability to pursue his chosen occupation. Cohane identifies the NCAA's report as the instrument that caused an alleged deprivation of his liberty interest without due process in violation of his rights under the Fourteenth Amendment. The Second Circuit allowed Cohane to proceed with his action against the NCAA, relying on *Brentwood I* to hold that Cohane may be able to prove a set of facts showing that the NCAA was a willful participant in joint activity with the State.

The Fourteenth Amendment erects no shield against private conduct. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). Constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. *Id.*, at 1004. Consequently, "state action" may be found if, and only if, there is such a close nexus between the State and the challenged action that the seemingly private action fairly may be treated as that of the State itself. *Brentwood I*, 531 U.S. at 295; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). The required close nexus between the State and the challenged action is necessary to insure both that an area of individual freedom is preserved by limiting the reach of federal law and that responsibility is not imposed upon the State for conduct the State does not control. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

Similarly, the under-color-of-law requirement of § 1983 excludes merely private conduct. *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). The purpose of § 1983 is to allow enforcement of the Fourteenth Amendment against those who carry a badge of authority of the State and represent the State in some

capacity. *Hafer v. Melo*, 502 U.S. 21, 28 (1991). A person acts under color of law for purposes of § 1983 only when exercising power possessed by virtue of State law and made possible only because the person is clothed with the authority of State law. *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981).

With its expansive application of the "joint participation" theory, the Second Circuit has invited a broad application of *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 936 (1982), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), despite this Court's efforts prior to *Brentwood I* to limit application of that theory to the particular facts of *Lugar* and *Burton*. *See, e.g., Sullivan, supra*, 526 U.S. at 57-58.[2] The Second Circuit's rationale effectively dispenses with the "under color of law" requirement for the private actor's § 1983 liability in a "joint participation" case, rendering the private actor liable for constitutional violations where the only allegations of "state action" relate to the acts of the government co-defendant. The Second Circuit's version of "joint participation" does not require any finding that the private actor be exercising power that is possessed by virtue of State law and made possible only because the person is clothed with the authority of State law. *Polk County v. Dodson, supra.*

Because the "joint participation" theory extends the reach of Fourteenth Amendment restrictions to otherwise private persons who were intended to remain beyond the reach of those constitutional requirements, the theory cannot be expansively applied as the Second Circuit did here. The

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[2] There were no dissents from the portion of *Sullivan* holding that the private insurers did not engage in state action. Justices Breyer and Souter joined that part of the majority opinion. *Id.*, at 62. Justice Ginsburg did not disagree, but simply concluded that resolution of the issue was not necessary because there was no underlying constitutional violation in any event. *Id.* And while Justice Stevens dissented in part, he did so only as to the claims against the state defendants. *Id.*, at 64-65.

theory must be limited to those circumstances where there is a showing of an active, knowing and willful conspiracy between the private actor and the state actor to commit the act on which the constitutional claim is based.[3] A more expansive application of the "joint participation" theory will not only lead to more confusing results like the one below, but will also impair the activities of state high school associations and their member schools, both public and private, by subjecting an array of private entities to the risk of liability under § 1983 simply because they have entered into relationships with those associations or schools.

ARGUMENT

A. The Second Circuit's "joint participation" analysis wrongly focused on the actions of the University and not on whether there was any active, knowing and willful conspiratorial act on the part of the NCAA that implicated Cohane's Fourteenth Amendment rights.

"Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint." *Blum*, *supra*, 457

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[3] Restricting the liability of private actors under the "joint participation" theory to true conspiracies between the private actor and the State may provide justification for the result in *Burton*. *Lugar*, on the other hand, was wrongly decided and is fundamentally at odds with the limiting effect that the requirements of "state action" and action "under color of law" are intended to have upon liability under the Fourteenth Amendment and § 1983, respectively. Unfortunately, *Lugar* has led to a decision like that of the Second Circuit here. The result of this sort of extension of *Lugar* to other settings, in the case of private entities that have some relationship with the State, is a virtually standard-less measure of whether the action of the private entity was "under color of state law" – leaving lower courts to apply constitutional restrictions to and uphold § 1983 claims against those private entities based on what really amounts to no more than a trial judge's "gut feeling."

U.S. at 1003. As the Second Circuit describes it, Cohane's complaint alleges any number of improprieties *on the part of SUNY Buffalo*. Cohane claims that the University forced his resignation in an effort to placate the NCAA. Cohane alleges that the University actively participated in the NCAA's hearing. Cohane alleges that the University intimidated witnesses and suborned perjury. The Second Circuit concluded that these allegations of University improprieties distinguished the case from *Tarkanian*.

The critical question before the Second Circuit was whether the NCAA acted under color of state law. Even accepting that the University's acts constitute "state action" for Fourteenth Amendment liability, missing from the Second Circuit's analysis is any suggestion of "action under color of law" by the NCAA. There is no suggestion, in the Second Circuit's analysis of the complaint, that the NCAA exercised power possessed by virtue of state law and made possible only because it was clothed with the authority of state law. *West v. Atkins*, 487 U.S. 42, 49 (1988); *Polk County v. Dodson*, *supra*. There is no suggestion by the Second Circuit that the NCAA jointly participated in, acquiesced in, or even had knowledge of the alleged improprieties committed by the University.[4] For a private actor to be liable under § 1983 for actions of the State, the private actor must be a "willful" participant in joint activity with the State. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).[5]

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[4] Under *Blum*, the State's involvement in the NCAA's private conduct may be sufficient to subject the State itself to liability if it arises to the level of State compulsion. But subjecting the State to liability for constitutional claims because of State action is far different than subjecting a private entity to § 1983 liability because of the State's actions when that private entity does not depend upon the "color of law" for its own actions.

[5] "Willful" participation by private actors in true "joint" activity with the State that produces the constitutional violation is a necessary component for finding action under color of state law, lest the private

B. An expansive reading of the "joint participation" theory will impair the ability of the NFHS's member associations, including the TSSAA, to enter into agreements with private entities or individuals because of the risk of constitutional exposure assumed by those entities and individuals.

After *Lugar*, this Court held that qualified immunity is not available as a defense to a private entity sued under § 1983. *Richardson v. McKnight*, 521 U.S. 399 (1997); *Wyatt v. Cole*, 504 U.S. 158 (1992). The "joint participation" theory of state action thus produces the anomalous result that a private person or entity may have even greater exposure for constitutional violations than its joint State participant in the challenged activity.[6]

Because this Court held in *Brentwood I* that the TSSAA is a "state actor" under an entwinement rationale, an expansive application of the "joint participation" theory means that private entities or individuals who contract with or act in coordination with the TSSAA may also be subject to § 1983 liability.[7]

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actors "face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S. at 937.

[6] Under the Second Circuit's version of "joint participation," the TSSAA could be liable for constitutional torts under § 1983 not only in its enforcement of bylaws under *Brentwood I*, but also in its routine employment decisions, its contracts with advertisers and vendors, its registration of game officials, its provision of benefits like catastrophic insurance to student-athletes, and every other act it takes – since it may be said that the State by virtue of the presence of public school principals on the TSSAA's governing body participates in every aspect of TSSAA's operations.

[7] Even if those private entities or individuals ultimately escape liability on the merits, the ability of a claim under the "joint participation" theory to so easily survive a motion to dismiss means that

For example, the TSSAA adopts "rules of the game" in basketball for its member schools to follow. The TSSAA also has a registration process for game officials in basketball, and the TSSAA requires that member schools use registered officials for their basketball games.[8] The officials are obtained by the schools through arrangements with regional officials' associations, private organizations that work with schools and other sports leagues to coordinate the assignment of officials for games. Under the Second Circuit's application of the "joint participation" theory, an official who officiates a basketball game at a TSSAA tournament, or even one who officiates a regular season game between two TSSAA member schools, may be subject to § 1983 liability for any occurrence at the game in which the official might be involved. The officials' association that assigned that official to the game may also be subject to such a claim.[9]

The same sort of result would follow in the case of a private security company providing security guards for a TSSAA-sponsored event. A security guard removing an

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those entities or individuals still face the deterrent effect that comes with the time and expense of prospective litigation.

[8] Game officials register with the TSSAA and receive some training from the TSSAA, but they are not employees of the TSSAA. They are independent contractors.

[9] This example highlights the practical difficulties not only with the "joint participation" theory under which the private actor could be sued but also with the threshold "entwinement" theory under which the TSSAA could be sued for constitutional violations. Under those theories, a coach who is removed from a basketball game for something said in an argument with a game official could assert First Amendment claims against both TSSAA and the official. While the result in *Tennessee Secondary School Athletic Association v. Brentwood Academy*, 127 S. Ct. 2489 (2007) ("*Brentwood II*"), may eventually lead to dismissal of the First Amendment claims after a trial or on summary judgment, the "entwinement" and "joint participation" theories would still be enough to enable the plaintiff to survive a motion to dismiss and subject the defendants to the cost of defending the claim on the merits.

unruly spectator or searching the purse of a spectator at an athletic event sponsored by an NFHS member association like the TSSAA would subject the TSSAA to potential constitutional liability based on the "entwinement" doctrine of *Brentwood I* and would subject himself and his employer to potential constitutional liability as "joint participants" with TSSAA.

Officials and security guards are not the only private entities or individuals that may be subject to constitutional scrutiny under the limitless "joint participation" theory. Hypothetically, suppose that an NFHS member association like the TSSAA schedules its state basketball tournament games in such a way that the boys' games are held at more desirable times than the girls' games. Under the Sixth Circuit's decision in *Communities for Equity v. Michigan High School Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), *cert denied*, 127 S. Ct. 1912 (2007), such scheduling could support a Fourteenth Amendment equal protection claim against the TSSAA under § 1983. Under an expansive application of the "joint participation" theory that does not require an active, knowing and willful conspiracy, advertising sponsors of the TSSAA state basketball tournament – whose sponsorship revenues might well be enhanced by the actions of the TSSAA – could also be subjected to Fourteenth Amendment claims under § 1983 as "joint participants" in the TSSAA's discriminatory conduct.[10]

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[10] This example is even more troublesome than those involving game officials or security guards, *supra*, because the particular action alleged to have caused the constitutional deprivation in the sponsorship example would be the action of the state actor TSSAA, not that of the private entity. Cohane's claim falls somewhere between these two examples – although he claims that the decision of the private entity the NCAA is what ultimately caused the deprivation of his liberty, the alleged misconduct that he points out is all misconduct committed by the state actor the University.

There are many other contractual relationships that organizations like the TSSAA use to assist in providing various services to their member schools and the students and families associated with those schools. The TSSAA contracts with a private company to post and sell photographs from TSSAA events. The TSSAA contracts with private individuals to assist in various aspects of its Student Services Program. The TSSAA contracts with a private insurance carrier to provide catastrophic insurance coverage for student-athletes. The TSSAA contracts with the NFHS to obtain rule books for the various sports. If the TSSAA is a "state actor" for all purposes, then in all of these activities, the private individuals or entities that contract with the TSSAA are at risk of liability as "joint participants" with the TSSAA under § 1983.[11]

Like the TSSAA, most of the NFHS member associations are made up predominantly of public schools. *Brentwood I*, 531 U.S. at 299. Only a small portion of the revenues of these associations comes from member school dues. *Id.* Critical to the ability of the member schools to maintain robust athletic programs is their ability to provide

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[11] The purpose of the requirements of "state action" under the Fourteenth Amendment and action "under color of law" under § 1983 is "to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004 (emphasis in original); *see also*, *Tarkanian*, 488 U.S. at 199 ("In the final analysis the question is whether 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.'" (quoting *Lugar*, 457 U.S. at 937)). In each of the examples above, however, a private entity would be treated as jointly participating in state action based on a contract with another private entity, resulting in the imposition of Fourteenth Amendment liability upon actors a step further removed from the State. These combined effects of the "entwinement" theory in *Brentwood I* and the "joint participation" theory in *Lugar* as applied by the Second Circuit here illustrate an expansive constitutional reach that all but disregards the limits that the "state action" and "under color of state law" requirements are intended to preserve.

adequate financial support for those programs, not only through ticket sales but also through things like advertising revenues and through controlling costs. With a variety of avenues for spending their advertising or sponsorship dollars, private businesses will be less likely to spend those dollars on high school athletics (or other public school-related activities) if doing so may subject them to § 1983 liability as "joint participants" in the activities of the public schools and their associations. If a liberal "joint participation" standard leaves even routine contracting parties exposed to § 1983 liability because of the "state actor" status of an association like the TSSAA, the additional costs associated with that exposure will be passed on to the association in that contract. If service providers like officials and security companies, or even the NFHS itself, must confront or insure against constitutional liability for their conduct, the cost to associations like the TSSAA for obtaining those services will undoubtedly rise.[12]

[12] The difficulties inherent in the "joint participation" theory are not, of course, limited to those private organizations that deal with state high school athletic associations like the TSSAA. For example, The Southern Association of Colleges and Schools (SACS) is an organization that is aimed at the improvement of schools, both public and private, through an accreditation process based on satisfaction of a variety of standards. *See, www.sacscasi.org/region/standards/index.html.* Many of the member schools of the TSSAA, both public and private, are accredited by SACS or by other similar accrediting organizations. Under the Second Circuit's liberal application of the "joint participation" theory, a constitutional claim based on an act taken by a public school in an effort to comply with SACS accreditation standards could subject SACS to § 1983 liability as a "joint participant" in the public school's act.

C. Expansive application of the "joint participation" theory may result in the imposition of constitutional liability upon private schools.

The TSSAA bylaws include a provision requiring that the host school of an athletic contest be responsible for providing sufficient security and insuring orderly conduct on the part of all spectators. This bylaw, adopted and enforced by TSSAA as a "state actor" under *Brentwood I*, applies with equal force to both the public and private member schools of the TSSAA. Compliance with this bylaw will expose even a private school member of the TSSAA to § 1983 liability if the Second Circuit's liberal "joint participation" theory is upheld.

If Brentwood Academy, a private school member of TSSAA, requires a spectator to leave the gymnasium at an interscholastic basketball game because of something that spectator is yelling at an official or at players, then Brentwood Academy is arguably enforcing the TSSAA bylaw requiring the school to insure the orderly conduct of spectators. Under the "joint participation" theory as espoused by the Second Circuit, this act by Brentwood Academy officials taken in the enforcement of a TSSAA bylaw could subject Brentwood Academy to liability under § 1983 for the ejected spectator's First Amendment free speech claim. This is just one example of many where a private school that has joined the TSSAA may be subject to liability on constitutional claims for actions taken in accordance with TSSAA bylaws, simply because the TSSAA is a "state actor" under *Brentwood I*. Similar applications of the "joint participation" theory could lead to a due process claim against a private school that discharges a coach because of the coach's violations of TSSAA bylaws, or an equal protection claim against a private school that declines to award financial aid to a female or African-American

student in order to maintain its classification status within the TSSAA.[13]

This sort of exposure to liability under § 1983 will serve as a strong disincentive to private schools. Adding this substantial disadvantage to membership in associations like the TSSAA may lead those private schools to search for other alternatives, including the formation of separate private school associations, where the private schools would not be faced with the possible costs of defending or insuring against constitutional claims under § 1983. Since other NFHS member associations are likely to be treated as "state actors" under the entwinement rationale of *Brentwood I*, this disincentive and the consequences of it would not be unique to Tennessee. The separation of public and private schools for their athletic competition (and other interscholastic activities like band, chorus, forensics, and debate) would ultimately harm the schools and the families and children they serve in both the public and private sectors.

The "joint participation" theory should be restricted to cases involving true conspiracies between the State and a private entity to deprive a plaintiff of a constitutionally protected right, so that a private actor in such a case is held to act "under color of state law" only where the actor engages in an active, knowing and willful joint undertaking with the State to cause the deprivation.

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[13] TSSAA has two classifications that are relevant to this example, "Division I" for schools that do not provide financial aid to student-athletes, and "Division II" for schools that provide need-based financial aid to student-athletes. A school in Division I may provide need-based financial aid to a student, and some private Division I schools provide such aid, but a recipient of such aid is not eligible to participate in interscholastic athletics at a Division I school.

CONCLUSION

The NFHS and the TSSAA as *Amici Curiae* respectfully submit that the Second Circuit's decision should be reversed.

Respectfully submitted,

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